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ABSTRACT

This volume summarizes and analyzes judicial decisions affecting educational policy and management that were handed down in 1986 by state appellate courts and federal courts. The book is divided into the following eight topical chapters, each written by one or more experts in education law: (1) "Employees" by Gail Paulus Sorenson; (2) "Bargaining" by Margaret D. Smith and Perry A. Zirkel; (3) "Pupils" by Henry S. Lufler, Jr.; (4) "Handicapped" by Nelda H. Cambron-McCabe; (5) "Torts" by William J. Evans, Jr.; (6) "Sports" by Stephen B. Thomas and Janet M. White; (7) "Finance" by Julie Underwood; and (8) "Higher Education" by Robert M. Hendrickson. The book includes an 11-page alphabetical index of approximately 1,000 cases cited in the text as well as a 6-page subject index. (TE)

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OF
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INTRODUCTION

This chapter analyzes more than 200 cases reported in 1986 involving precollegiate, public-sector employees. The review is comprehensive, excluding only those cases dealing with criminal and purely procedural issues, employment and unemployment benefits, and those cases found elsewhere in the *Yearbook:* tort cases involving employees and those focusing on collective bargaining. Also included in this chapter, where appropriate, are relevant 1986 Supreme Court cases from outside the field of education, as well as leading cases from prior years.

DISCRIMINATION IN EMPLOYMENT

Employment discrimination can be based on a multitude of factors and is prohibited by various, often overlapping, state and federal constitutional and statutory provisions. Many types of employment discrimination are prohibited by federal laws that extend to all institutions that receive federal financial assistance or that were passed pursuant to the authority of the thirteenth and fourteenth amendments to the Constitution. Title VII of the Civil Rights Act of 1964[1] covers discrimination based on race, color, religion, sex, and national origin (but not alienage) in both public and private institutions. Title IX of the Education Amendments of 1972 also prohibits sex discrimination (against employees and others) in educational institutions that receive federal aid;[2] and sex discrimination in the payment of wages is prohibited by the Equal Pay Act of 1963.[3] Age discrimination is prohibited by the Age Discrimination in Employment Act of 1975 (ADEA),[4] which was recently amended to remove the upper age limit, thus extending protection to most workers from age forty onward.[5]

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[1] 42 U.S.C. § 2000 *et seq.*

[2] 20 U.S.C. § 1681 *et seq.*

[3] 29 U.S.C. § 206 (d)(1).

[4] 42 U.S.C. § 1601 *et seq.*

[5] Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, 1986 U.S. Code Cong. & Ad. News (Vol. 10A). The only exception to removal of the upper age limit (not relevant here) is that tenured college and university faculty may still face mandatory retirement at age 70, an exception that is scheduled for repeal at the end of 1993.

"Otherwise qualified handicapped individuals" are protected from employment discrimination, perpetrated by federally aided institutions, under section 504 of the Rehabilitation Act of 1973 (section 504).[6] And those discriminated against because of alienage are protected, not by title VII, but by a civil rights statute known as section 1981,[7] which also protects against race discrimination in the making and enforcing of contracts; alienage discrimination would also be actionable under the Constitution's equal protection clause.

For those individuals who feel they have been subjected to employment discrimination based on some factor other than those enumerated above, they may be protected by the fourteenth amendment to the U.S. Constitution which prohibits states from denying to individuals the equal protection of the laws. Illustrating this type of case is a federal district court decision holding that a candidate for the office of regional superintendent of schools was denied equal protection by the operation of a state statute. The statute required that two of the previous four years of teaching experience be within the state. Although the regulation was intended to insure familiarity with the state's school code, evidence showed that it was not rationally related to achieving its purpose; the state's own teachers were not familiar with the school code and such a requirement was not mandated for the higher position of state superintendent, suggesting that it was an unnecessary requirement in any event. On the other hand, "not every difference in the treatment of public employees 'rises to the level of a constitutional deprivation,'"[8] as illustrated by a case where a teacher's aide was one of a small group that was not rehired, allegedly because of a minor complaint she made to a board member. The basis for the alleged discriminatory treatment was that she complained, while others did not.

Race

In 1986's leading case on discrimination based on race, the Supreme Court, in *Wygant v. Jackson Board of Education*,[9] gave further guidance on the permissible boundary of legitimate affirmative action. In a plurality decision, joined in full by only three justices, the Court struck down an affirmative action plan promulgated by the Jackson, Michigan, Board of Education and the Jackson Education Association. Because of "racial tension in the community that extended to its schools," a collective bargaining agreement was entered into in 1972 that provided for any necessary layoffs to be made by considering both minority status and seniority: "teachers with the most seniority in the district shall be retained, except that at no time will there be a greater percentage of minority personnel [Black, American Indian, Oriental, or Hispanic][10] laid off than the current percentage of minority personnel employed at the time of the layoff."[11] Several years later, adherence to this agreement resulted in nonminority teachers with greater seniority being laid off while minority teachers with lesser seniority were retained; this, in turn, prompted judicial action.

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[6] 29 U.S.C. § 794 *et seq.*

[7] 42 U.S.C. § 1981.

[8] Daniels v. Quinn, 801 F.2d 687 (4th Cir. 1986).

[9] 106 S. Ct. 1842 (1986).

In determining whether the agreement violated the equal protection clause, the Court stated that all classifications based on race and ethnicity are inherently suspect, even when "the challenged classification operates against a group that historically has not been subject to governmental discrimination."[12] Such classifications must be justified by a compelling governmental interest and narrowly tailored to achieve that interest. Rejecting the proferred justification of statistical disparities in the workforce resulting from "general societal discrimination" (and not from prior discrimination by the school district itself), the Court said that even if a compelling purpose for the agreement could be shown to exist, there were other problems with the policy. In a part of the opinion joined by ony three justices, it was concluded that the policy imposed a burden that was "too intrusive" and not narrowly tailored:

> In cases involving valid *hiring* goals, the burden to be borne by innocent individuals is diffused to a considerable extent among society generally. Though hiring goals may burden some innocent individuals, they simply do not impose the same kind of injury that layoffs impose. Denial of future employment opportunity is not as intrusive as loss of an existing job.[13]

Although Justice O'Connor, in a concurring opinion, felt that it was unnecessary to "resolve the troubling questions of whether any layoff provision could survive strict scrutiny,"[14] she did agree that the affirmative action provision was not narrowly tailored to effect a remedial purpose.[15] The four dissenters believed that justification for the affirmative action agreement was "found in the turbulent history of the effort to integrate the Jackson Public Schools,"[16] and in the

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[10] "Minority group personnel" were defined in this manner in the collective bargaining agreement. *Id.* at 1845 n.2.

[11] *Id.* at 1845.

[12] *Id.* at 1846, *citing* Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982), among other cases.

[13] *Id.* at 1851.

[14] *Id.* at 1857, O'Connor, J., concurring.

[15] *Id.*

[16] *Id.* at 1863. Marshall, J., joined by Brennan, J., and Blackmun, J., dissenting.

"unquestionably legitimate" effort to achieve and maintain a multiethnic faculty.[17] Nor did they believe that the chosen plan was anything but narrowly tailored to achieve important governmental objectives. Given the necessity for the unavoidable hardship of layoffs, a hardship that would affect minority and nonminority alike, the dissenters believed that the plan did not violate equal protection and was arrived at through fair procedures.

Standing in contrast to the affirmative action case considered above is an Eleventh Circuit Court of Appeals case evidencing classic, blatant, and invidious discrimination against a black male teacher, which resulted in an award of over $145,000 in damages.[18] The court held that there was substantial direct and circumstantial evidence to prove that the plaintiff, a teacher with a master's degree in educational administration, had been intentionally discriminated against when, on several occasions, he was not promoted to an administrative position. Additionally, white persons with lesser qualifications and shorter tenure had been promoted, two superintendents testified that race was a factor in personnel decisions (in part because superintendents who did the appointing had to consider community sentiment in order to be reelected to their positions), and qualifications for administrative positions were lowered so that three otherwise unqualified whites could be hired. Rejected as a pretextual defense for the plaintiff's lack of appointment to a particular principalship was the assertion that "white teachers would not accept [the plaintiff's] leadership." Shortly thereafter, the plaintiff had been elected president of the overwhelmingly white teachers union. Because intentional discrimination had been proven under title VII, section 1981, and section 1983 (which bars the state from violating federal constitutional and statutory rights),[19] plaintiff was properly awarded back pay, compensatory damages for proven humiliation and emotional distress, and punitive damages against one superintendent who preselected a white individual for a high school principalship and then conducted a sham search.

In another Eleventh Circuit case, a black male math teacher was awarded back pay and an order to appoint him to a principalship when intentional racial discrimination was proven: the school board breached a predetermination settlement agreement (reached with the help of the EEOC under a title VII complaint) when it failed to appoint the teacher to the first available administrative vacancy.[20]

Two additional cases illustrate that white persons working in predominately black institutions also may achieve protection from racially motivated discrimination under federal constitutional and statutory provisions. In one case, a white female director of a federally funded Head Start Program successfully proved race discrimination under title VII after she was forced to resign, was replaced by a black person, and no legitimate nondiscriminatory reason was given.[21] Back pay and either reinstatement to a comparable position or front pay were awarded, along with attorneys fees. Likewise, a white, male coach/athletic director was able to prove that his transfer was discriminatory by putting forth evidence that the principal at a predominantly black, urban school favored black coaches.[22]

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[17] *Id.* at 1868, Stevens, J., dissenting.

[18] Stallworth v. Shuler, 777 F.2d 1431 (11th Cir. 1985).

[19] 42 U.S.C. § 1983.

[20] Brewer v. Muscle Shoals Bd. of Educ., 790 F.2d 1515 (11th Cir. 1986).

About twice as many teachers, both white and black, were unsuccessful in asserting race discrimination claims in 1986 as were successful. In one Eighth Circuit case, although the court saw some evidence of discrimination against a black assistant principal who had defended black children, it declined to find the lower court's no-discrimination decision erroneous where there were "two permissible views of the evidence."[23] Citing *Anderson v. City of Bessemer City*,[24] it was emphasized that a reviewing court cannot reverse a plausible decision simply because it sees things differently. The Eighth Circuit declined to find a second lower court decision "clearly erroneous" where a white female was selected head special education teacher over a black male teacher, who then alleged discrimination.[25] Evidence suggested that the white female was selected because of prior experience as a head teacher and higher evaluations. And, in the final Eighth Circuit case, a dismissal was affirmed where a black male teacher sought to sue his accusors for intentional infliction of emotional distress when the underlying claim that he had been fired because of his race had already been litigated: "Yancy had his day in court."[26]

In the Second Circuit, a white Jewish school administrator claimed that the promotion of Hispanics and Italians presented evidence of race discrimination in violation of title VII and section 1981.[27] The court affirmed the lower court's decision that the board's failure to promote the plaintiff was based on legitimate reasons of qualification and merit. Race discrimination also was not proven where a black principal failed promptly to report two incidents of sexual misbehavior between students and overlooked the theft of a basketball backboard; furthermore, three out of the four "voluntarily reassigned" principals were white.[28]

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[21] Carter v. Community Action Agency, 625 F. Supp. 199 (M.D. Ala. 1985).

[22] Jett v. Dallas Indep. School Dist., 798 F.2d 748 (5th Cir. 1986).

[23] Rogers v. Masem, 788 F.2d 1288 (8th Cir. 1985).

[24] 105 S. Ct. 1504 (1985).

[25] Nelson v. Pulaski County Special School Dist., 803 F.2d 961 (8th Cir. 1986).

[26] Yancy v. McDevitt, 802 F.2d 1025 (8th Cir. 1986).

[27] Krulik v. Board of Educ., 781 F.2d 15 (2d Cir. 1986).

In the final cases in this section, one plaintiff did not establish a prima facie case of discrimination because he failed to show that his discipline was disporportionate: he was told by the board to undergo psychiatric evaluation following sexual advances toward students that the plaintiff said were "directed by a voice in his mind."[29] Another teacher failed to prove that she had standing to bring a race discrimination suit.[30] In the latter case, pursuant to a policy allowing only teachers and administrators living outside the district to enroll their children in the district where they worked, a white cafeteria worker was told she could no longer enroll her child, just after a black custodian was denied the same privilege. Although the plaintiff alleged that she was discriminated against under title VII as a "result of race, in the furtherance of discrimination against another individual,"[31] the only injury to her was an economic one, not based on race. The court explained that in order to assert the rights of a third party, one must allege a "work environment" or "associational" injury (i.e., that one is an employee and had a right to work in an environment free of race discrimination against others, or that one has been deprived of the right to associate with another person because of that person's race).

Religion

In 1972, section 701(j) was added to title VII of the Civil Rights Act of 1964[32] to require that an employer "reasonably accommodate . . . an employee's . . . religious observance or practice," if such accommodation can be made "without undue hardship on the conduct of the employer's business." In its first interpretation of this section, in *Trans World Airlines, Inc. v. Hardison* (1977),[33] the Supreme Court said that employers have no duty to accommodate when to do so would result in "undue hardship," which the Court defined as "more than a *de minimis* cost" to the employer. In 1986, the Supreme Court issued its second opinion on employers' obligations under this provision of title VII: the issue was not "undue hardship" but rather "reasonable accommodation."

Ansonia Board of Education v. Philbrook[34] involved a high school business teacher whose membership in the Worldwide Church of God required him to refrain from working on holy days, approximately six of which occurred during the school year. Pursuant to the collective bargaining agreement, teachers were permitted to use three days leave a year for mandatory religious holidays, and several days for other specified events (e.g., five days for a death in the family and one day for a wedding). In addition, teachers were permitted to take three days of leave for "necessary personal business," but could not use those days for events which were specified in other portions of the contract (e.g., they could not be used for weddings or religious holidays). Because the school board would not permit the teacher in question, Mr. Philbrook, to use his personal days for religious reasons or to pay for the cost of a substitute (and receive his full pay for those days), he had to take a leave without pay for approximately three days of religious holiday observance.

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[28] Morgan v. South Bend Community School Corp., 797 F.2d 471 (7th Cir. 1986).

[29] Crawford v. Charlotte-Mecklenburg Bd. of Educ., 641 F. Supp. 571 (W.D.N.C. 1986).

[30] Clayton v. White Hall School Dist., 778 F.2d 457 (8th Cir. 1985).

[31] *Id.* at 459.

[32] 42 U.S.C. § 2000e(j).

[33] 432 U.S. 63 (1977).

[34] 107 S. Ct. 367 (1986).

The Supreme Court rejected the court of appeal's conclusion[35] that an employer should be required by section 701(j) to accept an employee's reasonable accommodation proposal. The Court made clear that the statutory requirement, "[by] its very terms . . . directs that any reasonable accommodation by the employer is sufficient to meet its accommodation obligation."[36] The employer need not demonstrate that alternatives proposed by employees would result in undue hardship. Because the majority of the Court did not know if the personal days leave policy was actually used for limited purposes or whether it was open-ended, as alleged by Phillbrook, it remanded the case to the district court to determine if the board's accommodation was, in fact, reasonable. Although an employer may have no obligation to provide for paid leave, once the choice is made to do so, "unpaid leave [would not be] a reasonable accommodation when paid leave is provided for all purposes *except* religious ones."[37]

Sex

The year's leading case on sex discrimination occurred outside the field of education, but has direct implications for education at all levels. In *Meritor Savings Bank, FSB v. Vinson*,[38] the Supreme Court held that claims for sexual harassment can be brought under title VII even though "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature"[39] are not "directly linked to the grant or denial of an economic *quid pro quo*." The Court thus made clear that there are two types of sexual harassment: that based on a "*quid pro quo*" and that based on a "hostile environment": "[A] plaintiff may establish a violation of [t]itle VII by proving that discrimination based on sex has created a hostile or abusive work environment."[40] It cautioned, however, that a claim of sexual harassment would not be actionable unless it was "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"[41]

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[35] Philbrook v. Ansonia Bd. of Educ., 757 F.2d 476 (2d Cir. 1985). See discussion of this opinion in the *Yearbook of School Law 1985* at 5-6.

[36] Ansonia Bd. of Educ. v. Philbrook, 107 S. Ct. at 372.

[37] *Id.* at 373.

[38] 106 S. Ct. 2399 (1986).

[39] 29 C.F.R. § 1604.11(a).

The Court also said that "voluntary" sex-related conduct by the plaintiff will not necessarily preclude a finding that the sexual advances were "unwelcome." This determination, while difficult, will turn on the credibility of witnesses and evidence. Furthermore, evidence of a plaintiff's sexually provocative speech or dress was held relevant to the issue of whether the sexual advances were unwelcome.

On the issue of employer liability, *Vinson* made clear that while an employer is not automatically liable for harassment perpetrated by its supervisors and employees, "absence of notice . . . does not necessarily insulate that employer from liability."[42] The Court suggested that nondiscrimination policies should address themselves specifically to sexual harassment and should include an effective grievance procedure, one that accounts for the possibility of harassment arising at any level of the employment hierarchy.[43]

Representing a relatively new development in sex discrimination litigation, a *male* plaintiff alleged sex and age discrimination when he was not hired as a general science teacher, in favor of a younger woman.[44] The court held that plaintiff's own pleadings established that he was not qualified for the position by reason of severe and documented mental disability.

Also unsuccessful were several female plaintiffs. In one case, a teacher was granted unpaid maternity leave for the second semester and was thereafter denied disability leave (with pay) when she, in fact, became disabled during the period of her leave.[45] Since she had made a choice to take unpaid maternity leave, she could not thereafter assert a right to paid sick leave, even though she might have taken the sick leave if she had not already begun her maternity leave. The court held that there was no evidence that pregnancy-related disability was treated any differently by the district than any other disability. A second teacher was denied credit toward tenure for seven months of maternity leave, while others with disabilities were not denied such credit.[46] The court held that title VII was inapplicable to her situation because it had not been extended to cover states or political subdivisions at the time the credit was disallowed, and it had no retroactive effect. A third female teacher's title VII claim was unsuccessful despite the fact that a younger male teacher (with slightly less experience) was hired for an English position, in part, because of his coaching abilities.[47] The court held that proof that coaching skills played a part in the decision was insufficient to establish discrimination.

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[40] *Id.* at 2405-06.

[41] *Id.* at 2406 (citations omitted).

[42] *Id.* at 2408 (citation omitted).

[43] *See id.* at 2408-2409.

[44] Froneberger v. Yadkin County Schools, 630 F. Supp. 291 (M.D.N.C. 1986).

[45] West Hempstead Union Free School Dist. v. State Div. of Human Rights, 497 N.Y.S.2d 721 (App. Div. 1986).

In a case that demonstrates the difficult burden faced by those who appeal the denial of their discrimination claims, an additional female alleging sex discrimination was unsuccessful.[48] Although the female teacher had a master's degree and was more than minimally qualified for two administrative positions filled by males with only minimum qualifications, a federal court of appeals held that the evidence was "not clearly erroneous" that she was passed over because of legitimate, subjective personality factors. On the other hand, where a lower court had determined that there was a pattern of discrimination in a district, an appeals court remanded the case for a determination as to whether a female assistant director of transportation was, in fact, discriminated against when a male from outside the district was hired as director.[49] The court also determined that one of the district court's conclusions was clearly erroneous: the school district's reason for the decision was not pretextual, *viz.*, that the investigation of alleged improprieties committed by the former director made an outside candidate the preferable choice. An additional two decisions supporting sex discrimination against females were affirmed: the explanation of why a less qualified male was hired was "unworthy of credence,"[50] and a female who suffered sex and age discrimination was entitled to front pay and $5,000 for mental anguish.[51] And, in a decision discussed more fully in the "privacy" section, a federal district court held that a district had violated title VII and the Constitution by forcing a pregnant unmarried teacher to take a leave of absence.[52]

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[46] Schwabenbauer v. Board of Educ., 777 F.2d 837 (2d Cir. 1985).

[47] Grebin v. Sioux Falls Indep. School Dist. No. 49-5, 779 F.2d 18 (8th Cir. 1985).

[48] McCarthney v. Griffin-Spalding County Bd. of Educ., 791 F.2d 1549 (11th Cir. 1986).

[49] Wardwell v. School Bd., 786 F.2d 1554 (11th Cir. 1986).

[50] Smithtown Cent. School Dist. v. Beller, 502 N.Y.S.2d 781 (App. Div. 1986).

[51] Wantagh Union Free School Dist. v. New York State Div. of Human Rights, 505 N.Y.S.2d 713 (App. Div. 1986).

[52] Ponton v. Newport News School Bd., 632 F. Supp. 1056 (E.D. Va. 1986).

Among three wage dispute cases, a female food service coordinator was awarded back pay when her salary was reduced more than $2,000 following decertification of her position from the bargaining unit.[53] Evidence showed that the male managerial employees whose positions were decertified (the supervisor of maintenance and the supervisor of custodians) received salary increases. Two other claims of wage discrimination failed.[54]

National Origin

Like last year, discrimination based on national origin was the subject of only two reported cases. In one, a federal appeals court held that there was sufficient evidence to support the finding that a teacher's nonrenewal was based on incompetence rather than discrimination on the basis of East Indian Hindu origin.[55] In the other, the court held that an employment discrimination claim based on the plaintiff's Greek ancestry was timely filed under title VII and the equal protection clause, illustrating two major avenues for redress of alleged national origin discrimination.[56] There were no reported cases of alleged discrimination because of *association* with people of foreign national origin.[57]

Age

In actions under the Age Discrimination in Employment Act (ADEA),[58] a female plaintiff prevailed because of age and sex discrimination,[59] a male lost because he clearly was not qualified for the position for which he applied,[60] and two administrators prevailed because of age discrimination alone.[61] In the latter case, for reasons of financial exigency, plaintiffs were chosen for reassignment to teaching positions because they had given notice of intent to retire at the end of the year following reassignment. "[N]otification of intent to retire is so inexorably linked with age that it cannot be viewed as a separate factor" upon which to base a reclassification that was, in effect, a demotion even when done to "maintain continuity."[62]

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[53] Williamsburg Community School Dist. v. Commonwealth, 512 A.2d 1339 (Pa. Commw. Ct. 1986).

[54] Smith v. Bull Run School Dist. No. 45, 772 P.2d 27 (Or. Ct. App. 1986) (new teachers were paid more because of better qualifications and because of the need to entice them to rural area); Jennings v. Tinley Park Community Consol. School Dist. No. 146, 795 F.2d 962 (7th Cir. 1986) (custodians [all male], but not secretaries [all female], legitimately were paid overtime because it was necessary for them to work overtime, while secretaries could postpone extra work).

[55] Hemmige v. Chicago Pub. Schools, 786 F.2d 280 (7th Cir. 1986).

[56] Photos v. Township High School Dist. No. 211, 639 F. Supp. 1050 (N.D. Ill. 1986).

[57] For a case of this type, see last year's *Yearbook* at 7.

[58] 29 U.S.C. § 621 *et seq.*

[59] Wantagh Union Free School Dist. v. New York State Div. of Human Rights, 505 N.Y.S.2d 713 (App. Div. 1986).

[60] Froneberger v. Yadkin County Schools, 630 F. Supp. 291 (M.D.N.C. 1986).

[61] Equal Employment Opportunity Comm'n v. Community Unit School Dist. No. 9, 642 F. Supp. 902 (S.D. Ill. 1986).

Another ADEA case made clear that the Act reaches disparate impact claims (i.e., that intentional discrimination on the basis of age need not be shown), but denied relief because older teachers did not suffer discrimination by the implementation of a new salary system intended to decrease an ever-increasing disparity between older higher paid employees and younger lower paid employees.[63] The new plan was based on reasonable factors other than age.

Handicap

In two cases alleging handicap discrimination under state law, neither plaintiff was successful. In the first, a long-time teacher of severely and profoundly handicapped students was not discriminated against when he was discharged for inability to teach effectively and safely.[64] Due to a degenerative eye disease, the teacher had become legally blind, which made his ability to cope with a prior hearing disability even more difficult. The court held that discrimination does not exist where disability prevents "proper performance" and where the employee cannot be accommodated without undue hardship; state law did require, however, that the employee be accommodated, if possible, in a nonteaching position for which he was qualified. In the second state-law case tracking section 504 of the Rehabilitation Act of 1973,[65] a data processing department programmer had a "personality disorder" that resulted in his being chronically late for work.[66] The court upheld his dismissal, ruling that he was not "disabled" because the disorder did not limit major life activities. Furthermore, the district had no duty to reasonably accommodate him or to demonstrate that the disorder interfered with the performance of his job.

SUBSTANTIVE CONSTITUTIONAL RIGHTS

The constitutional rights reviewed in this section include the first amendment rights of freedom of speech, association, and free exercise of religion; as has been true for several years, free speech cases predominate. Also reviewed are cases concerning the right to privacy, where a notable increase in litigation has occurred, and cases alleging a violation of substantive due process (i.e., that state actions or policies are arbitrary or unfair in substance).

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[62] *Id.* at 905.

[63] Equal Employment Opportunity Comm'n v. Governor Mifflin School Dist., 623 F. Supp. 734 (D.C. Pa. 1985).

[64] Clarke v. Shoreline School Dist. No. 412, 720 P.2d 793 (Wash. 1986).

[65] 29 U.S.C. § 794 *et seq.*

[66] School Dist. v. Friedman, 507 A.2d 882 (Pa. Commw. Ct. 1986).

Speech

In a Supreme Court decision, *Memphis Community School District v. Stachura*, the Court reversed and remanded for a new trial a case where a teacher was successful in claiming a denial of free speech and due process rights. The new trial was to be limited solely to the issue of compensatory damages.[67] The Court held that "damages based on the abstract 'value' or 'importance' of constitutional rights are not a permissible element of compensatory damages . . . ."[68] The teacher had been awarded $46,000 in punitive damages and $275,000 in compensatory damages for his suspension from teaching, even though he had continued to receive his salary at all times during the controversy. The problem arose following community complaints about his use of sex education teaching materials, most of which had been approved in advance. Another case focusing on remedies for denial of free speech rights held that federal courts have the power to order reinstatement where "malicious intent to cause a deprivation of plaintiff's constitutional rights exists."[69] (The plaintiff had supported a rival school board candidate in opposition to the incumbent.)

In a unique free speech case, seven elementary school teachers claimed they had a free speech right to hold prayer meetings, in school, before classes began on Tuesday mornings.[70] The Seventh Circuit held that despite the fact that no students participated in the meetings and the meetings were not disruptive, the school had the right to avoid controversy and distraction by limiting the few meetings that were held before school to those that were work-related. The appeals court accepted the finding of the district court that no public forum had been created, and held that government can regulate content in a nonpublic forum. "[S]ince a school is not a traditional public forum like the streets or parks, the plaintiff had to show that the officials in charge of it made it a public forum."[71] The simple fact that the school had no articulated policy on the matter did not create a public forum.

A school parking lot also was held to be a nonpublic forum in a case involving the alleged right of a nonemployee to distribute flyers on behalf of a rival union.[72] In a similar case, there was no denial of free speech rights when a teachers organization was denied access to schools during school hours, and to school mail facilities; however, prohibiting teachers within the school from discussing the organization, mentioning it in private mail communications, and using billboards dedicated to the personal-message use of teachers did violate the teachers' free speech rights.[73]

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[67] Memphis Community School Dist. v. Stachura, 106 S. Ct. 2537 (1986).

[68] *Id.* at 2545.

[69] Banks v. Burkich, 788 F.2d 1161 (6th Cir. 1986).

[70] May v. Evansville-Vanderburgh School Corp., 787 F.2d 1105 (7th Cir. 1986).

[71] *Id.* at 1118.

[72] Grattan v. Board of School Comm'rs, 805 F.2d 1160 (4th Cir. 1986).

There were several cases reported in 1986 where adverse employment actions allegedly resulted from the protected free speech activities of employees. An Eleventh Circuit case illustrates that the initial determination, *viz.*, whether the speech is a matter of public concern rather than private grievance (under the *Connick* doctrine),[74] is a matter of law.[75] There, a high school history and science teacher spoke out against allowing students to choose their subjects and teachers ("collegiate registration") and out-of-field placement of physical education teachers and coaches in social studies positions—a practice he said contributed to "civic illiteracy." Rejecting the notion that all issues relating to public education are matters of public concern, the court looked at the content, form, and context of the speech and found that the teacher was primarily concerned about the discipline problems in his own classes arising from collegiate registration and about his own course assignments. Therefore, the court affirmed the summary dismissal of the teacher's claim, concluding that the speech could not "fairly be characterized as constituting speech on a matter of public concern."[76] Also not constituting matters of public concern were complaints made to a board member about the late arrival of reading materials,[77] a principal's statements to the board criticizing the superintendent for past actions and opposing the transfer of his wife from a senior high school position to a junior high position,[78] and a teacher's posting of letters on parents' night concerning a problem she was having with administrators.[79]

Speech was held to be a matter of public concern where a teacher criticized the abandonment of ability grouping and other policies and procedures relating to the educational function of the school;[80] where a coach said that few of his high school athletes could meet NCAA eligibility requirements, which was a matter of concern to the community;[81] where a teacher filed a grievance concerning high faculty turnover and sexual harassment of teachers and students;[82] where a permanent substitute teacher spoke as a parent against the transfer of a social studies teacher to an English position;[83] and where a former teacher's aide answered questions posed by a school board member regarding a budget controversy that had split the board.[84]

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[73] Texas State Teachers Ass'n v. Garland Indep. School Dist., 777 F.2d 1046 (5th Cir. 1985).

[74] See Connick v. Meyers, 461 U.S. 138 (1983).

[75] Ferrara v. Mills, 781 F.2d 1508 (11th Cir. 1986).

[76] *Id.* at 1516.

[77] Daniels v. Quinn, 801 F.2d 687 (4th Cir. 1986).

[78] Lewis v. Harrison School Dist. No. 1, 621 F. Supp. 1480 (D. Ark. 1985).

[79] Alinovi v. Worcester School Comm., 777 F.2d 776 (1st Cir. 1985). For further discussion of this case, see the "privacy" section.

[80] Cox v. Dardanelle Pub. School Dist., 790 F.2d 668 (8th Cir. 1986).

Legitimate, nondisciplinary transfers, or other adverse employment actions, sometimes can be made when teaching effectiveness is impaired because of otherwise protected speech. Illustrating such a situation is a case where a teacher who taught all lower grades in a small rural school district was transferred after filing a child-abuse report that caused widespread parental controversy.[85] Because the transfer was not for punishment, the court held that the teacher's free speech rights had not been violated.

Association

The first case in this section illustrates the application of analyses developed in the free speech context to a complaint alleging denial of freedom of association. A former teacher's aide failed to show that her nonrenewal infringed her right to free association because the decision not to rehire her was made prior to her alleged "fraternization" with work release prisoners who were working on the campus of her school.[86] Furthermore, the school board had a "strong interest" in prohibiting the social contact in question and such conduct, in any event, did not involve matters of public concern. In another case, a teacher with "eighteen years of exemplary service" was discharged (without a hearing) and her teaching certificates were cancelled for alleged misconduct.[87] The court, however, determined that the adverse employment actions were a result of the teacher's active political participation (in the context of a volatile political climate) and awarded the plaintiff $12,000 in back wages, $15,000 in actual damages for emotional and mental distress, and $10,000 punitive damages as a result of the defendant-superintendent's callous indifference to federally protected rights.

Religion

A controversy decided by a federal district court involved a

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[81] Jett v. Dallas Indep. School Dist., 798 F.2d 748 (5th Cir. 1986).
[82] Wren v. Spurlock, 798 F.2d 1313 (10th Cir. 1986).
[83] Lees v. West Greene School Dist., 632 F. Supp. 1327 (W.D. Pa. 1986).
[84] Brinkmeyer v. Thrall Indep. School Dist., 786 F.2d 1291 (5th Cir. 1986).
[85] Raposa v. Meade School Dist., 790 F.2d 1349 (8th Cir. 1986).
[86] Brew v. School Bd., 626 F. Supp. 709 (M.D. Fla. 1985).
[87] Kercado Melendez v. Aponte Roque, 641 F. Supp. 1326 (D.P.R. 1986).

Catholic school teacher who was denied leave for religious holidays under the "family days" section of the collective bargaining agreement (which allowed religious leave where the religion required it, but not where such leave was based on personal desire); however, the teacher was permitted to take paid "personal leave" days, despite the fact that religious services were readily available during nonworking hours.[88] The court said that even though the teacher was "thereby deprived of a day's leave that he might have used otherwise," it was a minimal imposition not rising to the level of a constitutional (free exercise) violation. An employee who made his own decision regarding religious "leave" was dismissed for breach of contract because of four days of unexcused absences, which he used to attend a religious convocation.[89]

In an area where there is little judicial precedent, and ample disagreement on the appropriate application of principles, the Oregon Supreme Court decided a case concerning a special education teacher, Janet Cooper, who converted to the Sikh religion, changed her name to Karta Kaur Khalsa, and regularly wore a white turban and clothing to teach her sixth and eighth grade classes.[90] Under a limiting construction of a state law prohibiting teachers from wearing "any religious dress" while teaching, the court upheld the validity of the law (against both state and federal free exercise claims) and the validity of a corollary statute mandating the loss of state certification. Saying that teachers could disclose personal religious views but could not proselytize, could wear common religious decorations, and might even be able to wear religious "dress" occasionally, the court distinguished the unacceptable appearance of state support for religion suggested by condoning the frequent wearing of "dress" or "garb" (as opposed to decorations, like "a small cross or Star of David"). In addition, the court held that where the religious dress statute had been legally applied to effect a teacher's suspension, "disqualification from teaching in public schools [was] based on one's doing so in a manner incompatible with that function."[91]

Privacy

Illustrating the various legal protections available for decisions relating to marriage, or lack thereof, and childbearing, are three 1986 cases from federal district courts in Illinois and Virginia. Relying on

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[88] DiPasquale v. Board of Educ., 626 F. Supp. 457 (W.D.N.Y. 1985).

[89] Neunzig v. Seaman Unified School Dist. No. 345, 722 P.2d 569 (Kan. 1986) (teacher was precluded from litigating religious discrimination claim before a state commission on civil rights because review had been under the teacher tenure act—proper appeal was to the judiciary).

[90] Cooper v. Eugene School Dist. No. 4J, 723 P.2d 298 (Or. 1986).

[91] *Id.* at 313.

Loving v. Virginia[92] and *Roe v. Wade*,[93] a federal district court in Illinois held that "it is beyond question that plaintiff had a substantive due process right to conceive and raise her child out of wedlock without unwarranted state (school board) intrusion."[94] Likewise, in Virginia, it was held that a pregnant unmarried teacher's title VII rights and her right to privacy were violated when she was forced to take a premature leave of absence.[95] "It is clear that the right to bear a child out of wedlock is protected by the Constitution,"[96] and that protecting schoolchildren from exposure to the teacher, if valid, is outweighed by the teacher's rights. And in Illinois, a court held that summary judgment was precluded where a male assistant principal alleged that his nonrenewal was based on his decision to marry one of the school's physical education teachers, contrary to the wishes of the principal.[97] The court called the right to marry "fundamental," although not linked to any particular constitutional provision; the court used string citations to document marriage as a "basic civil right."[98]

In the first decided case of mass drug testing of teachers, a New York court of appeals held that compulsory drug testing of probationary teachers who were about to be tenured (absent reasonable particularized suspicion) was a violation of the fourth amendment provision against unreasonable search and seizure.[99] In the absence of evidence of drug abuse, the required urine test was "an act of pure bureaucratic caprice."[100] Similarly, without deciding whether mandatory drug screening of school bus drivers and mechanics might be considered a reasonable search, a federal court held that the mandatory testing of a school bus attendant, without particularized probable cause, violated her fourth amendment rights.[101]

In the final case concerning privacy, a federal court of appeals rejected a teacher's argument that her privacy rights (specifically, her right to be free from unreasonable search and seizure) had been violated when she was forced to give her principal a case study paper she had written for a college course.[102] The paper, which discussed the educational needs of a handicapped student in the teacher's fourth grade class, contained criticisms of the principal's handling of the student's educational program. The court held that the teacher had no legitimate expectation of privacy in the paper because she had "voluntarily and unconditionally" given the paper to her professor and also to the school official responsible for a reevaluation of the student's program—a conclusion that also justified any disciplinary action that resulted from her initial refusal to turn over the paper.

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[92] 388 U.S. 1 (1967).
[93] 410 U.S. 113 (1973).
[94] Eckmann v. Board of Educ., 630 F. Supp. 1214, 1218 (N.D. Ill. 1986).
[95] Ponton v. Newport News School Bd., 632 F. Supp. 1056 (E.D. Va. 1986).
[96] *Id.* at 1061.
[97] Hall v. Board of Educ., 639 F. Supp. 501 (N.D. Ill. 1986).
[98] *Id.* at 512 n.15.
[99] Patchogue-Medford Congress of Teachers v. Board of Educ., 505 N.Y.S.2d 888 (App. Div. 1986).
[100] *Id.* at 891.
[101] Jones v. McKenzie, 628 F. Supp. 1500 (D.D.C. 1986).
[102] Alinovi v. Worcester Board Comm., 777 F.2d 776 (1st Cir. 1985).

Substantive Due Process

Violations of substantive due process are said to arise when state actions affecting property or liberty interests are arbitrary, capricious, or unfair in substance rather than lacking in procedural fairness and regularity. As an illustration, a court held that dismissal was not so disproportionate to the offense as to be "unduly unfair" where a bus driver, without checking a route sheet or a prekindergarten child's tag, dropped the child off at home rather than at a babysitter's house (two miles away).[103] Similarly, the dismissal of a tenured teacher for "various acts of misconduct" was held "not, under all of the circumstances, so disproportionate to the offenses in question as to shock one's sense of fairness."[104] In another case, Mississippi teachers claimed a denial of due process when their salaries were not increased as promised in a 1982 reform act.[105] Although the case report did not clearly state that the alleged wrong was one of substantive unfairness (e.g., that their salaries were capriciously kept low, as inferred here), the case was nevertheless dismissed as barred by the eleventh amendment, which prohibits federal court suits against states without their permission. One teacher was successful in proving that her dismissal was arbitrary, capricious, and discriminatory because of evidence of bias on the part of a majority voting for dismissal.[106]

In addition to the type of substantive due process claim illustrated above, substantive due process claims sometimes are based on the alleged denial of a nonexplicit liberty right (especially the right to privacy). An illustration of this type of claim is the Illinois case noted in the previous section, where the court found a substantive due process right to conceive and bear a child out of wedlock.[107]

PROCEDURAL DUE PROCESS

In order for employees to be entitled to procedural due process when adverse employment actions are threatened, it is necessary to show the deprivation (by government action or policy) of a "liberty" or "property" interest. Property interests often arise when an employee claims a legitimate entitlement to a particular position, and liberty interests arise when a government action threatens to damage an individual's reputation, thus foreclosing a range of future employment opportunities.

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[103] Tyson v. Hess, 498 N.Y.S.2d 779 (1985).

[104] Kaczala v. Board of Educ., 507 N.Y.S.2d 38 (App. Div. 1986).

[105] Mohler v. Mississippi, 782 F.2d 1291 (5th Cir. 1986).

[106] Leola School Dist. v. McMahan, 712 S.W.2d 903 (Ark. 1986).

[107] Eckmann v. Board of Educ., 630 F. Supp. 1214 (N.D. Ill. 1986).

Although the nature of due process varies with the scope of the entitlement and the extent of the deprivation, the Supreme Court has made clear that "notice and an opportunity to respond" are "essential requirements of due process."[108] Because a hearing must be provided before employees are deprived of significant property interests,[109] suspensions made necessary by emergency situations must be with pay. While the general rule requires that due process precede adverse employment actions, in emergency situations due process should follow as soon as possible. A public employee under contract, or protected by statutory pretermination rights, is entitled to minimum due process (at least): "oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story."[110] On the other hand, in many states, "[i]t is well settled that a probationary employee may be discharged [at the end of a term contract] without a hearing and without a statement of reasons . . . ."[111]

Illustrating the importance of raising all relevant legal issues in the initial stages of any employee-employer controversy is a case where an elementary school principal, in essence, may have "waived" his due process rights.[112] The principal, who was dismissed for supervising a child's father as the father beat the child in front of other students, was precluded from raising the alleged denial of due process in federal court because he had not raised the issue in prior state administrative and judicial proceedings.

Liberty and Property Interests

Several cases reported in 1986 illustrate that not every deprivation or injury implicates liberty or property interests. Even though residents were upset with the nonrenewal of a junior high school principal, it was held that "the simple non-renewal of a single, one-year contract,

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108. Cleveland Bd. of Educ. v. Loudermill, 105 S. Ct. 1487, 1495 (1985).

109. *Id.* at 1493 (citations omitted).

110. *See id.* at 1495.

111. Dillard v. Alvarado, 500 N.Y.S.2d 4, 5 (App. Div. 1986). *See also* Cardo v. Board of Educ., 503 N.Y.S.2d 122 (App. Div. 1986) (nontenured teacher not entitled to hearing prior to termination).

112. Sharpley v. Davis, 786 F.2d 1109 (11th Cir. 1986).

standing alone, will not constitute a matter of local controversy" sufficient to require a hearing under state law.[113] Similarly, the nonrenewal of a teachers aide did not implicate due process,[114] nor the nonrenewal of a one-year temporary teaching certificate,[115] nor the failure to promote or tenure.[116]

Several cases illustrate that the creation of property rights is very much dependent on state law. While the failure to offer a high school girls' basketball coach a position for the following year created no statutory entitlement to due process in Minnesota,[117] a similar situation did create such a right in West Virginia.[118] Analogously, although a contract van driver in Ohio was held not protected by civil service statutes requiring due process before termination (nonrenewal),[119] a New York City bus driver, employed by a private company to transport handicapped children to school, had a property interest in his employment pursuant to an agreement between his company and the NYC Board of Education: drivers could only be disqualified for "just cause."[120] Illustrating the usual rule for extracurricular assignments, a teacher was not entitled to due process when he was relieved of his responsibilities as a part-time advisor of the Young Farmers Program.[121] Because he was not a "professional employee" while performing his supplemental duties, he had no property right under state law.

In a federal court case, a teacher claimed denial of procedural due process under the fourteenth amendment when her term contract was not renewed without a notice of reasons as required by the Texas Term Contract Nonrenewal Act.[122] While leaving open the possibility of a state law claim, the federal court held, in an unusual opinion, that "violation of state procedures for nonrenewal . . . does not create a property interest for federal due process purposes."[123] While the court was no doubt correct in reasoning that the Act "was not intended to create a property interest in continued employment,"[124] the Act does appear to create an entitlement to continued employment absent notice of reasons for nonrenewal (despite the fact that this state-created right is not required for a simple nonrenewal by federal due process). As a general rule, federal courts will require strict adherence to state-created procedural mandates.

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[113] Dalton City Bd. of Educ. v. Smith, 349 S.E.2d 458 (Ga. 1986).

[114] Brew v. School Bd., 626 F. Supp. 709 (M.D. Ga. 1985).

[115] Hemmige v. Chicago Pub. Schools, 786 F.2d 280 (7th Cir. 1986).

[116] Photos v. Township High School Dist. No. 211, 639 F. Supp. 1050 (N.D. Ill. 1986) (no legitimate expectation of promotion); Sherrod v. Palm Beach County School Bd., 620 F. Supp. 1275 (N.D. Fla. 1985) (despite promise that teacher would be "recommended for tenure if he maintained a high level of professionalism," his expectation of tenure did not create a property right).

[117] *In re* Hahn, 386 N.W.2d 789 (Minn. Ct. App. 1986).

[118] Smith v. Board of Educ., 341 S.E.2d 685 (W. Va. 1985).

[119] Deryck v. Akron City School Dist., 633 F. Supp. 1180 (N.D. Ohio 1986).

[120] Stein v. Board, 792 F.2d 13 (2d Cir. 1986).

[121] Bravo v. Board of Directors, 504 A.2d 418 (Pa. Commw. Ct. 1986).

[122] Cogdill v. Comal Indep. School Dist., 630 F. Supp. 47 (W.D. Tex. 1985).

[123] *Id.* at 49.

[124] *Id.* (by implication).

Aspects of Notice

In those situations where due process is required, it is necessary that employees potentially subject to adverse employment actions have actual notice (or that proof of waiver of notice can be shown) and that the notice be sufficiently detailed to allow the employee to prepare an adequate response. Cases reviewed here illustrate that a note with only the date and time of the hearing was inadequate;[125] that a teacher faced with dismissal for insubordination, failure to report to work without appropriate approval for absence, and other due and sufficient cause was not provided with a fair summary of the reasons and evidence for dismissal;[126] and that cases may have to be reversed where a reviewing court cannot tell if sufficiently detailed notice was given.[127] Several additional cases illustrate that the notice must be timely.[128]

That the extent of due process is often determined by state law is illustrated by a case involving a South Carolina statute that authorized immediate dismissal (with prior notice and opportunity for a hearing), but did not require written notice nor an opportunity for remediation, when the charge was "evident unfitness."[129] In New York State, a bus driver's conference with her supervisor on the day of her dismissal, followed by a hearing thereafter, was held sufficient to satisfy due process.[130]

Aspects of Hearing

Employees successfully challenged aspects of the hearing process in several cases in 1986. In addition to the lack of a pretermination hearing before the summary dismissal of a bus attendant (as a result of one unconfirmed positive drug test), a District of Columbia federal court ruled that consideration of the employee's written submissions (as opposed to an oral defense) did not provide the employee with an adequate post-termination hearing.[131] Due process also was denied to two janitors who were given a hearing where there were no sworn witnesses and no written record;[132] where no hearing was provided to an assistant principal before "termination," though it was plainly required by state statute (even though the "termination" was intended to be a "nonrenewal");[133] where a teacher's proposed findings of fact were disregarded by the board, in violation of state law;[134] and where a tenured teacher was dismissed without a statutorily required hearing either prior to termination or within four months thereafter.[135]

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[125] Stein v. Board, 792 F.2d 13 (2d Cir. 1986).

[126] Zanavich v. Board of Educ., 513 A.2d 196, 197 (Conn. App. Ct. 1986).

[127] *See* Wells v. Dallas Indep. School Dist., 793 F.2d 679 (5th Cir. 1986).

[128] Salinas v. Central Educ. Agency, 706 S.W.2d 791 (Tex. Civ. App. 1986) (notice and hearing must precede adverse employment action); Koerner v. Joppa Community High School Dist. No. 21, 492 N.E.2d 1017 (Ill. App. Ct. 1986) (dismissal ineffective where notice not given within 60-day statutory period); Steinway v. Board of School Trustees, 486 N.E.2d 1045 (Ind. Ct. App. 1985) (written notification of intent to dismiss required not more than 40 nor less than 30 days prior to consideration); Kehoe v. Brunswick City School Dist. Bd. of Educ., 493 N.E.2d 261 (Ohio Ct. App. 1983) (timely notice of intent not to reemploy waived by acceptance of position as substitute teacher); Miller v. Culver Community Schools Corp., 493 N.E.2d 181 (Ind. Ct. App. 1986) (receipt of timely notice supported by evidence where secretary testified notice was on principal's desk).

[129] Kizer v. Dorchester County Vocational Educ. Bd. of Trustees, 340 S.E.2d 144 (S.C. 1986) ("evident unfitness" demonstrated by, *inter alia*, obstructing medical aid to student who had miscarriage in school).

[130] Tyson v. Hess, 497 N.Y.S.2d 779 (1985).

Courts determined that due process rights were not violated (1) when evidence that went beyond the scope of the charges was introduced at a hearing, but was not considered in dismissing an athletic director;[136] (2) when a board chairperson's statement prior to the hearing that "it would be best for [the director] to go" was held insufficient to show bias;[137] (3) where the record did not show improper influence by an attorney representing the board in a dismissal proceeding;[138] and (4) where a supervisor of maintenance was told of his termination (to be effective at a later date) before he had a hearing (harmless procedural error).[139]

DISMISSAL, NONRENEWAL, DEMOTION, AND DISCIPLINE

The criteria and procedures for public employee discipline are largely derived from state statutes, local school board policies, and local contract provisions. As long as minimum constitutional due process procedures are followed, the dismissal of tenured teachers, as well as those under term contracts, is usually governed by state law allowing dismissal for insubordination, unprofessional conduct, unfitness, willful neglect of duty, immorality, incompetence, or "other good cause." Less severe types of discipline, in some instances, are governed by different statutes or policies and often are accompanied by lesser procedural protections. Although state-created procedures vary in terms of the scope of review provided at different levels of the administrative review process, judicial review generally is limited to assessing whether administrative decisions are supported by substantial evidence or whether, on the other hand, they are "arbitrary and capricious."

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[131] Jones v. McKenzie, 628 F. Supp. 1500 (D.D.C. 1986).

[132] Pack v. West Clermont Local School Dist. Bd. of Educ., 492 N.E.2d 1259 (Ohio Com. Pl. 1985).

[133] Rogers v. Masem, 788 F.2d 1288 (8th Cir. 1985).

[134] McIntyre v. Tucker, 490 So. 2d 1012 (Fla. Dist. Ct. App. 1986).

[135] LaCroix v. Board of Educ., 505 A.2d 1233 (Conn. 1986).

[136] Merchant v. Board of Trustees, 492 So. 2d 959 (Miss. 1986).

[137] Kizer v. Dorchester County Vocational Educ. Bd. of Trustees, 340 S.E.2d 144 (S.C. 1986).

[138] Harvey v. Jefferson County School Dist., 710 P.2d 1103 (Colo. 1985).

[139] Everett v. Board of Trustees, 492 So. 2d 277 (Miss. 1986).

Because the usual nonrenewal decision does not implicate liberty or property interests, constitutional due process is not necessary; an exception to this is when an employee can show that the real reason for the nonrenewal may have been based on the exercise of a constitutionally protected right, such as free speech. Despite the lack of constitutional due process protections, however, there is a trend for states to provide procedural protections for nonrenewal.[140]

The cases that follow illustrate, among other things, two types of variability: in penalties imposed for infractions that are apparently similar in type or severity, and among state procedures regarding the legitimacy and willingness of a higher level review body to reverse prior administrative decisions. Although it is common for a number of charges to be lumped together in employee discipline cases, a majority of the cases that follow have been placed under the most relevant topic and have not been repeated elsewhere.

Insubordination

In the usual situation where an employee insubordination case was appealed, the employee's claim or defense was unsuccessful. In an exception to this generalization, a ten-year veteran elementary school teacher was transferred to another school but not given any duties because the principal was not expecting her arrival.[141] Because her contract said she should be at her first school, she returned there and spent her time helping other teachers. Her subsequent termination by the superintendent on grounds of insubordination (for not being at the proper school) was reversed because the charge was not supported by substantial evidence.

Four teachers were successfully dismissed on charges of insubordination when: an athletic director and head football coach failed to follow policies regarding the administration of funds;[142] a tenured teacher failed to report to work without proper excusal;[143] a teacher used "extreme profanity" in disciplining students in violation of a prior written prohibition;[144] and a male driver's education teacher willfully disregarded a directive disallowing the driving instruction of only one student at a time.[145] An additional teacher's dismissal for insubordination also was affirmed, but she was awarded her salary during the period of suspension that preceded her dismissal.[146]

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[140] This generalization is more true for professional personnel than it is for others. *See, e.g.*, Mastrangelo v. Board of Educ., 498 N.Y.S.2d 27 (App. Div. 1986) (secretary-stenographer who was terminated prior to the end of her probationary period was not entitled to a hearing under applicable civil service rules).

[141] Noxubee County Bd. of Educ. v. Givens, 481 So. 2d 816 (Miss. 1985).

[142] Merchant v. Board of Trustees, 492 So. 2d 959 (Miss. 1986).

Unprofessional Conduct, Unfitness, Willful Neglect of Duty

Three times as many employees were unsuccessful in reported actions relevant to this section as were successful. Among those teachers who were found fit were two teachers who had allegedly "physically abused" an emotionally disturbed eighth grader.[147] The Pennsylvania Supreme Court ruled that the Secretary of Education was empowered to conduct a de novo review, without receiving new evidence, and affirmed that evidence that the teachers had only lightly swatted the student for aggressive conduct precluded dismissal for "cruelty," "intemperance," or "willful and persistent violation" of the state's anticorporal punishment statute. Another court held that a teacher's conduct in putting a student in a closet and later giving him three swats with a yardstick in front of the class with his bluejeans pulled down was not "irremediable conduct" so as to sustain the teacher's dismissal; a psychologist testified that the teacher could conform her future conduct to administrative directions.[148] Also not constituting "willful neglect of duty" was a gym teacher's unintentional rental of an "R" rated movie, "Blue Thunder" (which contained a silhouetted nude scene and mild profanity), where the teacher had been instructed to rent videos to use during bad weather.[149]

In one of the more unusual fact patterns, remand was necessary to determine whether an exonerated teacher had been guilty of "conduct unbecoming a teacher" under the "preponderance of the evidence" standard rather than the higher "clear and convincing evidence standard."[150] Even though the teacher's alleged conduct (offering a high school student $500 to kill the principal and two assistant principals, and later allegedly soliciting a former student to kill the principal) might be criminal in nature, the higher standard of proof was unwarranted in an administrative proceeding because the school had a strong interest in protecting the student body.

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[143] Zanavich v. Board of Educ., 513 A.2d 196 (Conn. App. Ct. 1986).

[144] Ware v. Morgan County School Dist. RE-3, 719 P.2d 351 (Colo. Ct. App. 1985).

[145] Crump v. Board of Educ., 339 S.E.2d 483 (N.C. Ct. App. 1986). The teacher involved in this case was also accused of immorality, but that charge did not have to be considered by the court in view of the finding of insubordination.

[146] Harvey v. Jefferson County School Dist., 710 P.2d 1103 (Colo. 1985).

[147] Belasco v. Board of Pub. Educ., 510 A.2d 337 (Pa. 1986).

[148] Swayne v. Board of Educ., 494 N.E.2d 906 (Ill. App. Ct. 1986).

[149] Terry v. Houston County Bd. of Educ., 342 S.E.2d 774 (Ga. Ct. App. 1986).

[150] Board of Educ. v. State Bd. of Educ., 497 N.E.2d 984 (Ill. 1986).

Among cases where employees were ultimately unsuccessful were several where the charges were similar to those found in the "immorality section," suggesting that "unprofessional conduct" and "immorality" charges often may not be dissimilar or that the definitions of these charges vary from state to state. Cases where orders of dismissal were affirmed or reinstated concerned a school custodian who had possessed a controlled substance in his home ("other improper conduct" not limited to that which takes place at school);[151] another custodian whose possession charge was dismissed due to illegally seized evidence (exclusionary rule not applicable to administrative hearings);[152] a tenured elementary school principal who was arrested and convicted of possession of marijuana with intent to distribute;[153] and a teacher who had allowed cheerleaders to drink beer in a motel while on a school-sponsored trip ("neglect of duty" affirmed).[154] Even where a teacher's criminal conviction for theft was later reversed, he did not prevail in seeking reinstatement.[155] Since there was no new relevant evidence regarding the alleged mishandling of money collected for a school-related trip to Hawaii, and since the teacher had not appealed the administrative decision, he could not later allege a denial of due process in federal court.

Physical abuse of students was the subject of two neglect of duty cases, one where a male teacher repeatedly struck junior and senior high school boys in the groin (declared not a "remediable teaching deficiency");[156] and another where a tenured, physical education teacher was dismissed after twelve years of teaching for kicking a student in the thigh in anger.[157] In the latter case, since the hearing panel did not find evidence to substantiate additional charges, the case was remanded to reassess the dismissal sanction.

A teacher who failed to report for work for two weeks at the beginning of a school year was properly dismissed for "neglect of duty."[158] Following the August 17th notice to him from the state tenure commission that the purported cancellation of his contract had been unjust, he had an obligation to report to work at the opening of the school year; the school had no duty to notify him of the starting date. Dismissal also was affirmed against a teacher who was often absent and refused to follow school regulations,[159] a teacher who lacked organizational ability,[160] and a long-time secretary who shouted at staff members and refused to follow orders.[161]

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[151] School Dist. v. Puljer, 500 A.2d 905 (Pa. Commw. Ct. 1985).

[152] Deshields v. Chester Upland School Dist., 505 A.2d 1080 (Pa. Commw. Ct. 1986).

[153] Summers v. Vermillion Parish School Bd., 493 So. 2d 1258 (La. Ct. App. 1986).

[154] Blaine v. Moffact County School Dist. RE No. 1, 709 P.2d 96 (Colo. Ct. App. 1985).

[155] Gleason v. Board of Educ., 792 F.2d 76 (7th Cir. 1986).

[156] Mott v. Endicott School Dist. No. 308, 713 P.2d 98 (Wash. 1986).

[157] Thomas v. Cascade Union High School Dist. No. 15, 724 P.2d 330 (Or. Ct. App. 1986).

Immorality

Among those cases where adverse employment actions were based on "immorality," drug cases and those involving improper sexual conduct predominated. While one teacher who had distributed and allowed students to use pills and marijuana was successfully discharged,[162] two other teachers who allegedly possessed marijuana were reinstated. In one case, there was no evidence that the teacher had knowledge or control over marijuana plants found in a communal garden at his home,[163] and in the other case the board did not show a "rational nexus" between the conduct performed outside of work and work-related duties (i.e., that the behavior affected performance or became a subject of notoriety).[164]

The majority of the improper sexual conduct cases concerned teachers' conduct with students. In a case where a male teacher was exonerated, it was determined that there was insufficient evidence of his alleged sexual assault of a male student.[165] In another case, a teacher was properly suspended without pay for a semester based upon credible evidence that he exposed himself to several fifth and sixth grade students during individual music lessons.[166] It was held that "where a teacher's conduct occurs on school grounds during working hours, or otherwise involves students, and is obviously inappropriate, disciplinary actions may be taken without a pleading or showing of adverse effect."[167] The more severe penalty of dismissal was affirmed against a male elementary school teacher who pinched three second-grade female students on the buttocks.[168] The conduct was held not "remediable" because it had immediate adverse psychological effects on the children involved, harmed the reputation of the school, and had a high probability of recurrence. Similarly, the dismissal of another male teacher was affirmed where evidence showed he had improper sexual contact with a twelve-year-old emotionally disturbed male student.[169] There was no abuse of discretion when the hearing officer, in her discretion, refused to allow the teacher to depose the student.

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[158] Franklin v. Alabama State Tenure Comm'n, 482 So. 2d 1214 (Ala. Civ. App. 1985).

[159] San Dieguito v. Commission on Professional Competence, 220 Cal. Rptr. 351 (Ct. App. 1985).

[160] Kirtley v. Dardanelle Pub. Schools, 702 S.W.2d 25 (Ark. 1986).

[161] Botkin v. Board of Educ., 504 N.Y.S.2d 521 (App. Div. 1986).

[162] Nolte v. Port Huron Area School Dist. Bd. of Educ., 394 N.W.2d 54 (Mich. Ct. App. 1986) (decision of Commissioner supported by evidence).

[163] Forehand v. School Board, 481 So. 2d 953 (Fla. Dist. Ct. App. 1986).

[164] Rogliano v. Fayette County Bd. of Educ., 347 S.E.2d 220 (W. Va. 1986).

[165] Ferris v. Austin, 487 So. 2d 1163 (Fla. Dist. Ct. App. 1986).

[166] Miller v. Grand Haven Bd. of Educ., 390 N.W.2d 255 (Mich. Ct. App. 1986).

[167] *Id.* at 259.

In cases involving alleged sexual misconduct out-of-school, one teacher's dismissal was affirmed based on evidence that he sexually abused the two young daughters of a woman with whom he lived;[170] and another teacher's dismissal was remanded to the state fair dismissal board for its determination whether, in its own discretion rather than in its perception of community opinion, the teacher's act of sexual intercourse in an adult bookstore was immoral.[171]

Other teachers were successful in defending against adverse employment actions based on immorality in cases involving an out-of-wedlock pregnancy;[172] the knowing transportation of stolen securities (because the dismissal penalty was "too severe" in light of the teacher's previous record);[173] and the alleged making of immoral advances toward female students (because the language used was not sufficient to show sexually provocative or exploitive conduct).[174]

Teachers, a principal, and a guidance counselor were unsuccessful in cases involving attempting to cash an endorsed social security check found in a locker room;[175] permitting male wrestlers and female cheerleaders to occupy the same accommodations on a trip to a state wrestling meet;[176] attempting to establish a "social/emotional" relationship with a sixteen year old student;[177] claiming to be ill in order to engage in recreation (and other instances of lying);[178] and instructing a light-weight wrestler to weigh-in for an overweight wrestler at a tournament.[179]

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[168] Board of Educ. v. Hunt, 487 N.E.2d 24 (Ill. App. Ct. 1985).

[169] Rosenberg v. Board of Educ., 710 P.2d 1095 (Colo. 1985).

[170] Lile v. Hancock Place School Dist., 701 S.W.2d 500 (Mo. Ct. App. 1985).

[171] Ross v. Springfield School Dist. No. 19, 716 P.2d 724 (Or. 1986).

[172] Eckmann v. Board of Educ., 636 F. Supp. 1214 (N.D. Ill. 1986).

[173] Pawtucket School Comm. v. Board of Regents, 513 A.2d 13 (R.I. 1986).

[174] Madril v. School Dist. No. 11, 710 P.2d 1 (Colo. Ct. App. 1985).

[175] McBroom v. Board of Educ., 494 N.E.2d 1191 (Ill. App. Ct. 1986).

[176] Schmidt v. Board of Educ., 712 S.W.2d 45 (Mo. Ct. App. 1986).

[177] Keating v. Board of School Directors, 513 A.2d 547 (Pa. Commw. Ct. 1986).

[178] Fontana Unified School Dist. v. Burman, 225 Cal. Rptr. 484 (Cal. Ct. App. 1986).

[179] Florian v. Highland Local School Dist. Bd. of Educ., 493 N.E.2d 249 (Ohio Ct. App. 1983).

Incompetence

As in prior years, most reported cases of incompetence are resolved in favor of school boards' adverse employment decisions. For example, a state supreme court held that a tenured teacher was properly dismissed for "just cause" following a year-and-a-half of attempts to help her correct problems with discipline, grading, leaving students unattended in the classroom, tardiness, etc.[180] However, another teacher was reinstated with back pay because of a school board's failure to allow for remediation of "substandard performance."[181] This latter case represents the first in two years where a teacher was successful in reversing a dismissal decision based on incompetence. An additional teacher/principal successfully challenged a transfer decision, under a state statute mandating a hearing, when it was held that the proposed transfer was not for "legitimate or reasonable administrative purposes": the evidence did not support the allegation of a discipline problem at the school from which the employee was to be transferred.[182]

In a classic case of incompetence, an appeals court held that a thirteen-year veteran teacher was properly terminated for "incompetency and inefficiency in line of duty" for: failure to properly supervise students during recess and field trips, failure to "show energy and vitality," failure to work effectively with parents, failure to pursue college course work, failure to maintain good relationships with students, failure to treat students fairly, failure to define rules for students, failure to deal adequately with discipline problems, and failure to move around and talk sufficiently loud during classes.[183]

Other employees who unsuccessfully sought reinstatement following dismissal for incompetence included a sixty-six year old, tenured home economics teacher who did not follow curriculum guides and did not maintain appropriate discipline;[184] and a bus driver who backed up a bus without proper supervision and unilaterally changed the order of the bus stops.[185] In the first of these cases, the court held that the school district had no obligation to transfer the teacher to a grade school position (where she previously had taught satisfactorily) and, in the second case, the dismissal penalty suffered by the bus driver did not "shock one's sense of fairness."

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180. Wilson v. DesMoines Indep. Community School Dist., 389 N.W.2d 681 (Iowa 1986).

181. Iven v. Hazelwood School Dist., 710 S.W.2d 462 (Mo. Ct. App. 1986).

182. Alabama State Tenure Comm'n v. Lowndes County Bd. of Educ., 479 So. 2d 1269 (Ala. Civ. App. 1985).

183. Cozad v. Crane School Dist. R-3, 716 S.W.2d 408 (Mo. Ct. App. 1986).

184. Stamper v. Board of Educ., 491 N.E.2d 36 (Ill. App. Ct. 1986).

185. Brigandi v. Board of Educ., 500 N.Y.S.2d 740 (App. Div. 1986).

Compliance with School Board Policies and State Statutes

Before a school district decides to implement an adverse employment decision, it usually is necessary to consider the applicability of state or local procedural mandates. However, where an adverse employment decision is made for reasons other than discipline (e.g., the simple nonrenewal of a term contract, a temporary suspension because of illness, or a change in curricular or extracurricular assignment for educational reasons), special procedural protections often are not available.

The cases reported in this subsection overlap to some extent with cases reported in other subsections, particularly those immediately preceeding this one and those reported in the section on procedural due process. Rather than repeat cases mentioned in other places, the cases reported here are those that focused on aspects of compliance with state and local law rather than on compliance per se or on the substantive issue involved (e.g., incompetency).

Among cases where employees were successful in challenging the sufficiency of compliance with state statutes was a situation involving a tenured fourth grade teacher dismissed for "inefficiency."[186] An appellate court remanded the case for a determination as to whether the board allowed a ninety-day period for remediation, as required by state law. Also successful was a teacher and head football coach who was transferred to a full-time teacher position (after a hearing) because of several losing seasons, a revenue decline, incompetent supervision of players, and loss of credibility with the public.[187] The coach was held entitled, by statute, to an evaluation and an opportunity to improve before his transfer.

Among other employees who successfully relied on state law were a probationary teacher who received two years of back pay (less amount earned in mitigation) for the board's failure to follow a statutory procedure in a nonrenewal decision;[188] an employee of the building and grounds department who was improperly suspended by a supervisor rather than by the superintendent of schools;[189] an assistant superintendent who was fired without the recommendation of the superintendent;[190] a teacher who was awarded back pay for the period between his suspension and hearing (salary was a right—it was not "damages" subject to mitigation);[191] a long-time principal who was awarded an increase in salary because his transfer, in effect, was a demotion;[192] and a tenured teacher, assigned to teach electronics but not certified in that subject, who was granted a hearing despite a state statute prohibiting employment outside of one's certification area.[193]

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[186] Rowley v. Board of Educ., 500 A.2d 37 (N.J. Super. Ct. App. Div. 1985)

[187] Hosaflook v. Nestor, 346 S.E.2d 798 (W. Va. 1986).

[188] Westen Grove School Dist. v. Stain, 707 S.W.2d 306 (Ark. 1986).

[189] Stoetzel v. Wappingers Cent. School Dist., 497 N.Y.S.2d 788 (App. Div. 1986).

[190] Greater Clark County School Corp. v. Myers, 493 N.E.2d 1267 (Ind. Ct. App. 1986).

Employees were not the beneficiaries of state statutory protections in cases where a thirty-day warning letter was properly sent prior to termination (statutory period may be enlarged but not reduced);PXS where reversible error was committed by a trial court's failure to make special findings of fact when reversing a school board's dismissal decision (because the reviewing court could not tell whether evidence was lacking or the lower court inappropriately substituted its own judgment);[195] where a board had complied with a state statute requiring that demotion of principals be made pursuant to a private or public hearing before the board, and not before an impartial hearing officer as decided by a lower court;[196] and where a teacher was not entitled to a statutory salary increment that previously had been withheld for excessive absenteeism.[197]

In addition to the above cases, a principal was unsuccessful in his attempt to have his one-semester suspension revoked for breach of a board regulation requiring him to "take reasonable precautionary measures" for the health and safety of students: he had failed to get parental permission slips and to inspect buses before a sixth grade trip to Meramec Caverns (where one student drowned).[198] Where a board did not adhere to its own policies requiring remediation, however, a librarian's termination for incompetency was held invalid.

REDUCTION-IN-FORCE AND INVOLUNTARY LEAVES OF ABSENCE

A reduction-in-force (RIF), which results in dismissing employees or placing them on involuntary leaves of absence, can result from the consolidation of school districts, reorganization within a district, or programmatic reorganizations within schools. The necessity for a RIF, the selection of employees to be adversely affected, the realignment or reassignment of retained employees, and call-back rights are governed by state statutory requirements, local school board policies, and collective bargaining agreements.[199]

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[191] Hawley v. South Orangetown Cent. School Dist., 501 N.Y.S.2d 318 (1986).

[192] Foster v. Board of Elementary and Secondary Educ., 479 So. 2d 489 (La. Ct. App. 1985).

[193] Loftus v. Board of Educ., 509 A.2d 500 (Conn. 1986).

[194] Cozad v. Crane School Dist. R-3, 716 S.W.2d 408 (Mo. Ct. App. 1986).

[195] Scott County School Dist. 2 v. Dietrich, 496 N.E.2d 91 (Ind. Ct. App. 1986).

[196] Meadows v. School Dist. U-46, 490 N.E.2d 140 (Ill. App. Ct. 1986).

[197] Cordasco v. Board of Educ., 501 A.2d 171 (N.J. Super. Ct. 1985).

[198] Bell v. Board of Educ., 711 S.W.2d 950 (Mo. Ct. App. 1986).

Employees affected adversely by a necessary RIF usually do not have the type of "legitimate claim of entitlement" that would allow for constitutional due process protections; and while state law sometimes gives such employees procedural rights (especially when the adverse action is characterized as a "dismissal"), more often than not, few procedural protections are available. A case that illustrates the exceptional rule, where procedural protections were available, was settled in Massachusetts in 1985.[200] There, a woman who had served five years as the principal of an elementary school was dismissed when her school was closed for budgetary reasons. The court held that state statutes providing procedural protections for tenured "teachers" also applied to "principals," who are teachers with special managerial duties.

Constitutional procedural due process is available, in unusual circumstances, when employees claim that RIF decisions were made in a manner that violated their constitutional rights (e.g., to equal protection or free speech). An example of such a situation was discussed in the race discrimination section, where a voluntary RIF provision in a collective bargaining agreement was held to violate equal protection because it, in effect, disfavored senior white teachers while favoring less senior minority teachers.[201] RIF cases raising constitutional issues are dealt with in the first three sections of this chapter.

Although not strictly a matter of RIF, this section also contains an occasional case where RIF principles or statutory provisions were applied in cases where educational reorganization efforts did not result in RIF or fewer positions, but nonetheless had an adverse impact on particular employees.

Necessity for Reduction-in-force

When educational programs are reorganized, there must be valid economic or educational reasons for the reorganizations. Resulting dismissals or layoffs are prima facie legitimate, but can be challenged by employees, who bear the burden of proving that positions were abolished for other than legitimate reasons.[202] For those employees who do not challenge the proposed elimination of positions and the reasons therefore, at least one appellate court has held that the employees conceded the propriety of the district's actions.[203]

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[199] As is true in situations of dismissal and discipline, nonprofessional employees often have fewer state-created procedural and substantive protections than do a school district's professional employees. *See, e.g.*, State v. Middletown City School Dist. Bd. of Educ., 485 N.E.2d 768 (Ohio Ct. App. 1984) (classified civil service employees could not exercise displacement rights because the statute regulating such rights exempted employees of cities—which included employees whose salaries were set by the city).

[200] Rantz v. School Comm. of Peabody, 486 N.E.2d 44 (Mass. 1985).

[201] Wygant v. Jackson Bd. of Educ., 106 S. Ct. 1842 (1986).

Cases which illustrate legitiate reasons for reorganization include the following where: a substantial decrease in overall enrollment was sufficient evidence to sustain the suspension of teachers in drivers education and photography, despite the lack of decreased enrollment in those classes,[204] and anticipated budget problems justified the suspension of a music teacher pursuant to a decision to eliminate a music program (the programmatic changes were made for "educational reasons").[205] It is clear that most states do not require that decisions to eliminate particular positions be individually justified, as long as legitimate financial or educational reasons are evidenced.[206]

Elimination of Position

Several cases in the previous subsection illustrate the flexibility maintained by school districts in choosing which positions to eliminate for good faith economic or educational reasons. In an analogous situation, where the absolute number of positions was actually increased by half a position, and where evidence of enrollment decline and financial need was lacking, a part-time administrative position nevertheless was legitimately discontinued and its components consolidated into a new full-time position.[207] Even though this action resulted in the administrator (who also held a full-time teaching position) being put on unrequested leave from the original part-time administrative position, it was held to be a bona fide discontinuance of the position. A final case illustrates that general allegations of "bad faith" in the abolition of positions are insufficient to present an issue of fact for trial.[208]

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[202] *See* Page v. Franklin County School Bd., 481 So. 2d 43 (Fla. Dist. Ct. App. 1985).

[203] Roseville Educ. Ass'n v. Independent School Dist. No. 623, 391 N.W.2d 846 (Minn. 1986).

[204] Mongelluzzo v. School Dist., 503 A.2d 63 (Pa. Commw. Ct. 1985).

[205] Glendale School Dist. v. Feigh, 513 A.2d 1093 (Pa. Commw. Ct. 1986).

[206] *See, e.g.*, Bye v. Special Intermediate School Dist. No. 916, 379 N.W.2d 653 (Minn. Ct. App. 1986). In this case, despite the court's holding that there was no need to legitimate the decision to eliminate particular positions, it also held that the elimination of a dental lab position was not supported by the evidence, which indicated substantial enrollments for the lab course.

[207] Bates v. Independent School Dist. No. 482, 397 N.W.2d 239 (Minn. Ct. App. 1986).

[208] Gagnon v. Board of Educ., 500 N.Y.S.2d 801 (App. Div. 1986).

Selection of Employee

Although employees may have no statutory right to notice and a hearing for temporary, budgetary suspensions,[209] a school board has the responsibility to make rational decisions when selecting employees for a RIF. One school board's decision to place on unrequested leave only those teachers who did not request a hearing concerning proposed layoffs (even though some of them were senior to teachers who were retained) was reversed as arbitrary.[210] On the other hand, a school board acted appropriately in transferring an administrator to a teaching position when an administrative position was eliminated for financial reasons, especially since the teacher had not been certified as an administrator in the first instance.[211]

As is true in simple or multiple realignment situations, the selection of employees for RIF often is based on a number of criteria, including seniority, licensure, tenure, and experience, with seniority the predominate criterion. In one case, when a teacher layoff was required among shop instructors, the board illegally laid-off a teacher who was entitled to seniority credit for the years he had served in the armed forces under the state's veterans' preference act.[212] On the other hand, a teacher was not entitled to seniority credit for the years she had taught communications skills prior to her appointment as a probationary reading teacher because, under state provisions, these positions were in distinct tenure areas.[213] Analogously, a teacher could not claim seniority credit for a period he had worked as an instructional aide before becoming a teacher.[214] And a final case held that "subjective" performance criteria in a RIF policy were legitimate and did not evidence discriminatory intent.[215]

Realignment/Reassignment

Seniority is also a recurrent criterion in realignment or reassignment decisions, as illustrated by the following cases. When his school was closed, an assistant principal was demoted to teacher in violation of a state statute permitting him to "bump" one of the district's less senior assistant principals.[216] Even though the school district's reorganization plan did not require the lay-off of employees, the court held that the statute requiring reassignment by seniority was applicable. Additional cases allowed a plaintiff who had served for more than three years while certified as a principal to bump an untenured principal (one who had served as principal fewer than three years while certified);[217] a junior high school principal to bump a senior high school principal rather than accept assignment as a senior high school assistant principal;[218] and a teacher with veterans credit to bump someone without such credit.[219]

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[209] *See* Ciccone v. Cranston School Comm., 513 A.2d 32 (R.I. 1986) (appeal procedures are reserved for those who face permanent dismissal).

[210] Roseville Educ. Ass'n v. Independent School Dist. No. 623, 380 N.W.2d 512 (Minn. Ct. App. 1986).

[211] School Dist. v. Brockington, 511 A.2d 944 (Pa. Commw. Ct. 1986).

[212] Northeastern Employee Intermediate Unit No. 19 v. Stephens, 510 A.2d 1267 (Pa. Commw. Ct. 1986).

[213] Moore v. Board of Educ., 500 N.Y.S.2d 710 (App. Div. 1986).

[214] *In re* Proposed Placement on Unrequested Leave of Absence, 381 N.W.2d 476 (Minn. Ct. App. 1986).

[215] United States v. Mississippi, 641 F. Supp. 232 (S.D. Miss. 1986).

Several cases illustrate that teachers cannot claim realignment rights when they are not certified and qualified.[220] In one case, a teacher was reinstated to her middle school guidance position because bumping rights were not permitted to a more senior teacher who, despite completion of certification requirements, was not certified at the time of his reassignment.[221] In a complex case involving the layoff of over 400 teachers, remand was necessary to determine if a realignment was possible to accommodate more senior teachers licensed in industrial arts where the district claimed that the teachers it retained held more comprehensive "combined positions."[222] The court stated, nevertheless, that reasonable realignment would not require the splitting of combined positions.

In New York State, where tenure often is earned in discrete tenure "areas," one court held that a junior high school health teacher could not bump a less senior teacher in a "general junior high school" academic subject, because health had been maintained as a separate tenure area.[223] Another New York case held that a teacher laid-off from his position as a trade and industrial training program coordinator was entitled to bump in the general "secondary area"; the district had not effectively created a separate tenure area in the teacher's prior position and had not notified the teacher that his tenure area was unique.[224]

Experience within the field and other miscellaneous qualifications also have been held valid in situations involving realignment. Lack of successful relevant teaching experience precluded a teacher of visually

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216. Abington School Dist. v. Pacropis, 506 A.2d 485 (Pa. Commw. Ct. 1986).

217. Rantz v. School Comm., 486 N.E.2d 44 (Mass. 1985).

218. Gibbons v. New Castle Area School Dist., 500 A.2d 922 (Pa. Commw. Ct. 1985).

219. James v. Big Bever Falls Area School Dist., 511 A.2d 700 (Pa. Commw. Ct. 1986).

220. *See, e.g., In re* Proposed Placement on Unrequested Leave of Absence, 381 N.W.2d 476 (Minn. Ct. App. 1986) (lack of certification and teaching experience negated realignment rights).

221. Wattsburg Area School Dist. v. Jarrett, 513 A.2d 588 (Pa. Commw. Ct. 1986).

222. Brandhorst v. Special School Dist. No. 1, 392 N.W.2d 888 (Minn. 1986).

223. Hicksville Congress of Teachers v. Hicksville Union Free School Dist. Bd. of Educ., 499 N.Y.S.2d 774 (App. Div. 1986).

224. Boyer v. Board of Educ., 503 N.Y.S.2d 981 (Sup. Ct. 1986).

impaired students from bumping a less senior elementary school teacher, where the collective bargaining agreement required such experience;[225] and a female home economics teacher was held not qualified to bump a male physical education teacher (though she was certified in physical education) because the physical education position required supervision of the boys' locker room.[226]

Realignment decisions in cases involving more than one school district present some problems that are unique. For example, where one district discontinued its business education program and contracted with a neighboring district to provide two classes for the first district, a teacher who was laid-off had no right to realignment within the second district under a state statute providing for realignment by seniority when "grades or portions of grades" from two districts are consolidated. In another case, a tenured teacher at a state-operated school for the hearing impaired, who was laid-off for financial reasons, put forth an unsuccessful claim for system-wide tenure.[227] Because she had been offered and rejected a full-time position at her previous school, she abandoned her tenure rights and her right to reemployment.

In a case illustrating the complexity of multiple bumping, Blythe was properly given preference over plaintiff-James because of a veteran's preference act; and, the district was not required to allow James (who was certified only in social studies) to bump a less senior teacher (certified in social studies, Spanish, and elementary education—and actually teaching social studies and Spanish) who then would have been required to bump an elementary education teacher (leaving no one to teach the Spanish courses).[228] The court recognized the impracticality of such a realignment in situations where an employee has multiple certification.

Call-back Rights

State statutes or local agreements usually provide limited call-back rights for employees who have been subject to involuntary lay-offs. While seniority may be respected during the call-back period,[229] entitlement to reappointment may be limited in duration[230] and may not provide for multiple realignment. While call-back rights knowingly can be waived, one court held that a teacher did not waive call-back rights or the right to remain on the preferred eligible list by rejecting a mid-year offer of reemployment.[231]

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[225] Blank v. Independent School Dist. No. 16, 393 N.W.2d 648 (Minn. 1986).

[226] Zink v. Board of Educ., 497 N.E.2d 835 (Ill. App. Ct. 1986).

[227] O'Toole v. Forestal, 511 A.2d 1236 (N.J. Super. Ct. App. Div. 1986).

[228] James v. Big Bever Falls Area School Dist., 511 A.2d 900 (Pa. Commw. Ct. 1986).

[229] *See, e.g.*, Poppers v. Tamalpais Union High School Dist., 229 Cal. Rptr. 77 (Ct. App. 1986) (state law mandated reappointment of most senior qualified terminated employees).

[230] *See* Masto v. Board of Educ., 511 A.2d 344 (Conn. 1986) (former assistant high school principal was entitled to call-back rights for only one year).

In New York State, which extends call-back rights to positions that are "similar," a board was directed to reinstate a former junior high school math teacher to a senior high school math position.[232] The teacher was qualified, had seniority, and the positions were similar (math in grades seven through twelve was one tenure area). In another action, where a guidance counselor had been reassigned to a social studies position (when three districts were consolidated into two), he had no right to be recalled to a guidance position, but only to any vacancy for which he was qualified.[233]

CONTRACTUAL DISPUTES

Contractual problems can arise concerning almost any aspect of the employer-employee relationship, but the most important problems concern the validity of the employment contract itself. For a valid contract to exist, there must be an offer, an acceptance of that offer, and "consideration" (usually a quid pro quo, such as a promise to work in exchange for a promise of salary). Among the questions that arise are whether there was an offer, whether it was revoked before acceptance, whether there was a valid acceptance, whether a contract arose by operation of law, and whether a party to the contract breached the contract. The cases that follow involve these questions, among others, and illustrate the great variety of problems that can arise in the making and enforcing of contracts and in the interweaving of common law contract principles with state administrative and statutory provisions.

Board Policies and Contract Stipulations

A state court of appeals, applying the common law doctrine of promissory estoppel, held that a school board could not deny the validity of a teacher's employment contract.[234] The teacher, who previously had taught Spanish and Italian under two one-year contracts, was twice told by the principal that she would be rehired for the following year; she read a notice posted by the principal promising that all faculty would be rehired; and she relied on such promises to her detriment. Not so successful was a tenured third grade teacher who received a new contract conditioned upon her receipt of recertification by July 10th.[235] The court held that by failing to sign the board's contract offer within a stated period of time, the offer had been revoked by operation of law, and the teacher had no further right to employment.

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[231] Lewis v. Cleveland Hill Union Free School Dist., 506 N.Y.S.2d 608 (App. Div. 1986).

[232] Kohler v. Board of Educ., 505 N.Y.S.2d 924 (App. Div. 1986).

[233] Valentine v. Joliet Township High School Dist. No. 204, 802 F.2d 981 (7th Cir. 1986).

[234] D'Ulisse-Cupo v. Board of Directors, 503 A.2d 1192 (Conn. App. Ct. 1986).

Two cases involved the issue of breach of contract. In the first, a school board's failure to give reasons for the nonrenewal of a part-time principal, and an opportunity to improve, violated its own policies and thus amounted to a breach of contract.[236] The principal in this case was partly unsuccessful, however, because the court vacated her recovery of damages for loss of earning capacity and mental anguish as not recoverable in a breach of contract action. In the second case, a tenured teacher who wished to resign his coaching duties while retaining his tenured teaching position was told that his coaching and teaching duties were contractually linked.[237] The court held that the teacher had properly sought a declaratory judgment regarding whether his resignation from coaching would breach his contract because, absent a cancellation of his contract, the teacher had no remedy under the state's tenure law.

There were several cases reported in 1986 concerning the interpretation of contractual provisions. In one case the contract was "unambiguous" in providing for the continued maintenance of certification, thereby justifying the dismissal of a teacher;[238] and in another case ambiguous language was interpreted to entitle a plaintiff to any head coaching position that might arise, not only to a head football coaching position.[239] In addition, reemployment was granted under a collective bargaining agreement to a noncertified teacher (who had taught under a statute permitting noncertified persons to teach), where the teacher was granted a sabbatical for "teachers" and returned fully certified: he was thus, a "teacher" for purposes of reemployment.[240] Not so fortunate was a teacher who, because of a bureaucratic mix-up, failed to obtain recertification within a two-month grace period allowed by the district.[241] The court held that the teacher's retroactive recertification was not sufficient to affect disciplinary actions (short term suspension and loss of salary) taken by the board pursuant to a valid contract that the teacher would possess certification.

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[235] Nelson v. Doland Bd. of Educ., 380 N.W.2d 665 (S.D. 1986).

[236] Myrtle Springs Reverted Indep. School Dist. v. Hogan, 705 S.W.2d 707 (Tex. Ct. App. 1985).

[237] Moss v. Williams, 409 So. 2d 575 (Ala. 1986).

[238] Gamble v. Mills, 483 So. 2d 826 (Fla. Dist. Ct. App. 1986).

[239] United States v. Mississippi, 641 F. Supp. 232 (S.D. Miss. 1986).

[240] South Conejos School Dist. RE-10 v. Martinez, 709 P.2d 594 (Colo. Ct. App. 1985).

[241] Singleton v. Hony County School Dist., 345 S.E.2d 751 (S.C. App. 1986).

Administrative Regulations and Statutory Provisions

Among cases reported in 1986, about an equal number dealt with the interpretation or application of state statutory or administrative provisions affecting contracts as involved local contract provisions. Also reflected among these cases are issues involving the creation, termination, and interpretation of contracts, with cases concerning creation (offer and acceptance) predominating.

Illustrating how technical legal provisions can both negatively and positively affect employees are three cases involving administrators. In one, although the school board voted to offer a principal a new two-year contract, which both the principal and the board president signed, the contract was held not valid because it had not been signed by the secretary of the board as required by state law; therefore, the board's subsequent nonrenewal of the principal was valid.[242] Also invalid was the attempted withdrawal by a principal of his offer to resign.[243] Although the principal (who resigned in the middle of the Fall semester saying "I am not doing the professional job which I think is necessary") apparently had second thoughts, they came too late: the court held that state law expressly provided for acceptance of a resignation by the superintendent (which was done), and not by the board as the former principal argued. The legitimacy of a four-year contract saved the job of a superintendent when a succeeding school board sought his removal.[244] A court of appeals held that the prior board had validly increased the term from one to four years because it was done before the superintendent accepted the initially proferred one-year term contract.

Among the cases involving "acceptance" of offers was a case where a tenured teacher's failure to return a contract offer within a thirty-day statutory period resulted in loss of tenure status;[245] where a school board's failure to void a teacher's contract and to timely notify the teacher of nonrenewal resulted in automatic renewal;[246] where a teacher was barred by statute from participating in a state professional improvement program because he owed continuing education debts (failure to meet conditions of offer precluded acceptance);[247] and where a maintenance employee (who admitted to signing in for two days she had not worked) resigned rather than be subjected to dismissal.[248] In the latter case, the court held that "[w]hen a choice is made between two validly imposed alternatives, duress is absent as a matter of law."[249] (The offer of two valid alternatives cannot void the acceptance of one—there is no duress when there are alternatives.)

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[242] Morton v. Hampton School Dist. No. 1, 700 S.W.2d 373 (Ark. Ct. App. 1985).

[243] Warren v. Buncombe County Bd. of Educ., 343 S.E.2d 225 (N.C. Ct. App. 1986).

[244] Stagnolia v. Board of Educ., 714 S.W.2d 486 (Ky. Ct. App. 1986).

[245] Walker v. Sierra Vista Unified School Dist. No. 68, 712 P.2d 451 (Ariz. Ct. App. 1985). Although the board in this case had the power to offer the teacher a continuing contract, it chose not to do so, offering him instead a contract requiring a new probationary period.

[246] Noxubee County School Bd. v. Cannon, 485 So. 2d 302 (Miss. 1986).

[247] Anderson v. State, 481 So. 2d 719 (La. Ct. App. 1985).

The first case of alleged breach of contract illustrates how state law can operate to negate what might otherwise be a breach. A school psychologist, who had worked one year of a two-year contract, was legally dismissed pursuant to a state statute permitting the suspension of contracts because of a decrease in student enrollment.[250] Another employee, alleging breach of contract when she was not permitted to return to work following absence for an eye injury, was admonished to seek administrative remedies before bringing her judicial action.[251]

Cases involving the interpretation of contract provisions held, respectively, that a teacher who worked more than 60% time during one semester was not entitled, under state law, to be classified as a probationary (rather than temporary) employee because the statute required more than 60% full-time work for a full school year;[252] that Saturday and Sunday are not "public holidays" during which teachers have a statutory right not to work;[253] and that a statute prohibiting the employment of teachers who are also elected school-board members does not mean that a teacher may not run for school-board office, as long as he agrees to resign his teaching position if elected.[254]

TENURE

When an employee has earned the right to "tenure," or to a "continuing contract," or to be employed "at discretion," employment can be terminated only in limited circumstances. As was seen in the section on reduction-in-force (RIF), tenured employees can be subject to dismissal or involuntary layoff when legitimate reorganization necessitates reducing the size of the workforce. Apart from those few situations where the police power of the state permits the dismissal of tenured employees (e.g., because of a legitimate RIF or because of failure to pass state-required competency examinations), tenured employees may only be dismissed "for cause," as defined in state statutes (e.g., incompetency, immorality, willful neglect of duty, etc.). "For cause" dismissals require that affected employees be provided procedural due process; tenure rights are property rights protected by the fourteenth amendment.

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[248] Atkins v. Birmingham City Bd. of Educ., 480 So. 2d 585 (Ala. Civ. App. 1985).

[249] *Id.* at 586.

[250] Bennett v. Board of Educ., 491 N.E.2d 742 (Ohio Ct. App. 1985).

[251] Alabama Ass'n of School Bds. v. Walker, 492 So. 2d 1013 (Ala. 1986).

[252] Berkeley Fed'n of Teachers v. Berkeley Unified School Dist., 224 Cal. Rptr. 44 (Ct. App. 1986).

[253] Penns Grove-Carneys Point Educ. Ass'n v. Board of Educ., 506 A.2d 1289 (N.J. Super. Ct. App. Div. 1986).

[254] LaBosco v. Dunn, 502 N.Y.S.2d 200 (App. Div. 1986).

Those employees who may acquire tenure are defined by state law, and variously include noncertificated employees, administrators, supervisors, and teachers; among these, only teachers may acquire tenure in all states. While tenure usually is awarded after a specified period of full-time, successful employment in a district or state, in some states teachers and adminstrators acquire tenure only in a particular discipline, area of instruction, or job. Tenure is lost when an employee moves to another state; and, in most states, one loses tenure when one accepts employment in another district.

Whether one can maintain tenure when moving vertically from a teaching to an administrative position or vice versa also depends on state law. Tenured teachers usually retain their right to tenure, as teachers, when they take administrative positions; however, in those states that award tenure to administrators, the employee may be required to serve another probationary period in order to gain tenure as an administrator. In states that do not award tenure to administrators, downward vertical transfers to the teaching ranks is facilitated; if the administrator has not acquired tenure as a teacher, the board has the option of nonrenewal of a term contract.

Tenure Status

Whether an employee has a right to tenure, and the conditions the employee must meet, vary greatly from state to state. For teachers, the acquisition of tenure usually depends upon successfully serving a probationary period of from two to five years. In a state where a two-year probationary period is required, it was held that a teacher who worked only 180 out of 187 days in his first school year, but who completed a second full year of teaching, did not acquire tenure at the end of the second school year.[255] The court held that the state used the "anniversary date" method of determining the end of the probationary period, so that the teacher could not acquire tenure until October 3rd of his third year. In a state requiring service for the "three previous school years," a teacher who taught two full years and part of a third year before taking unpaid child-rearing leave did not acquire tenure at the end of the third school year.[256] Another case held that once having acquired status as a tenured teacher, nine years of service as an administrator did not negate status as a tenured teacher.[257]

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[255] Breuhan v. Plymouth-Canton Community Schools, 389 N.W.2d 85 (Mich. 1986).

As one of the few states limiting tenure to particular disciplines or areas of teaching responsibility, New York State had more than its share of cases involving tenure status. In one, a teacher with more than twelve years of experience was laid-off when his supervisory position was abolished.[258] The court reinstated the teacher in the "secondary area" because the district had not effectively created a separate tenure area in the position the employee had most recently filled and had not notified the teacher that his tenure area was unique. In another New York case, a board legitimately denied tenure to an administrator who, upon leaving her position as reading coordinator, had to serve a new period of probation.[259] The court further held that the new period of probation began to run from the time the plaintiff was appointed "acting" administrator, rather than from her earlier appointment as an "interim acting" administrator, as she had argued, so that denial of tenure for excessive tardiness was not arbitrary.

Tenure by Default or Acquiescence

When a school board fails to act in a timely manner to properly nonrenew employees before they complete probationary periods, courts have held that employees have acquired tenure by "default" or "acquiescence." For example, an Ohio teacher who did not receive actual notice of nonrenewal in a timely manner obtained a statutory right to a continuing contract.[260] Other teachers obtained tenure because of a statutorily deficient notice;[261] and because of successful service for a fourth year without notice of nonrenewal (despite the school district's attempt to avoid tenure by transferring the teacher to an intermediate school unit).[262]

An additional case where a teacher received tenure illustrates the complexities surrounding two New York statutes: one permitting periods of a term or more served as a regular substitute to count toward tenure (called "Jarema credit"), and the other allowing a teacher who has earned tenure in another New York district to serve a new probationary period of only two rather than three years in his new district. The facts of the case showed that a tenured science teacher resigned a position in the state and was later hired in another New York district. He taught in the new district as a substitute and in a probationary position for nearly three years before the board attempted to "terminate" him. Since the proposed "termination" followed more than two years of teaching in substitute and probationary status, the teacher was entitled to tenure by estoppel, which results when "a school board permits a teacher to continue beyond the time his probationary term expires, without taking any action required by law to grant or deny tenure."[263]

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[256] Matthews v. School Comm., 494 N.E.2d 38 (Mass. App. Ct. 1986).

[257] Wolfe v. Sierra Vista Unified School Dist. No. 68, 722 P.2d 389 (Ariz. Ct. App. 1986).

[258] Boyer v. Board of Educ., 503 N.Y.S.2d 981 (Sup. Ct. 1986).

[259] Schensul v. Community School Bd. 32, 504 N.Y.S.2d 213 (App. Div. 1986).

[260] State *ex rel.* Francu v. Windham Exempted Village School Dist. Bd. of Educ., 496 N.E.2d 902 (Ohio 1986).

[261] Memphis Community Schools v. Henderson, 394 N.W.2d 12 (Mich. Ct. App. 1986).

[262] Day v. Prowers County School Dist. RE-1, 725 P.2d 14 (Colo. Ct. App. 1986).

Employees who were unsuccessful in asserting their tenured status included a vice principal who was notified at the conclusion of her three-year term contract that she would not be granted tenure.[264] Because she was terminated effective twenty-three days after three calendar years (which the board argued was compensation for an earlier period when she was laid-off for twenty-three days), she claimed tenure by estoppel. The court held that the probationary period was measured by the calendar year rather than the school year, and was properly extended by the lay-off period.

In a case that illustrates the importance of the position in which one actually serves rather than the title one has, a tenured New York State teacher was denied tenure as a junior high school principal.[265] Although appointed as a junior high school principal, the teacher had in fact worked for several years in central administrative offices. When he later began to serve as a junior high school principal, he was denied tenure by estoppel because "to hold petitioner entitled to tenure in the field position of junior high school principal when all but a few months of his claimed probationary service [had] been in central administration runs contrary to [the] legislative purpose" of determining competency.[266]

CERTIFICATION

Except in extraordinary circumstances, state certification (either temporary or permanent) is required for teachers and administrators to be legally qualified to serve in their positions. As in other areas, standards for certification, its acquisition and maintenance, and decertification vary from state to state. Whether certification properly has been revoked or suspended, whether one has a right to seek recertification, and under what circumstances, are also matters of state law.

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[263] *Id.* at 669.
[264] O'Dea v. School Dist., 504 N.Y.S.2d 895 (App. Div. 1986).
[265] Roberts v. Community School Bd., 495 N.Y.S.2d 960 (N.Y. 1985).
[266] *Id.* at 963.

Certification Standards

Cases in this subsection deal with certification status and any attendant procedural protections, and with substantive certification standards and their implementation. In a case that illustrates the need for proper certification, a tenured middle school math teacher, whose provisional teaching certificate had expired, was suspended for a year to allow him to seek certification.[267] An appellate court held that the teacher was not entitled to reinstatement because his new provisional certification was for an elementary school position and, furthermore, was not obtained within a year. In a case illustrative of state discretion in matters of certification criteria and their application, a court would not substitute its judgment for a board of examiners' decision denying a school psychology license.[268] The board determined that one-and-a-half years of experience was not a sufficient substitute for the requirement of a supervised internship. In a final case, a tenured home economics teacher with thirty years of experience was reinstated and awarded back pay after she was improperly discharged without a state-mandated hearing on the issue of her certification status.[269] It was later discovered that the teacher's lack of timely presentation of evidence of her recertification was due to the state's delay.

Decertification, Revocation, or Suspension

In controversies involving decertification, four cases reported instances where teachers were successful and two where teachers were not successful; the latter two cases are particularly interesting because teachers claimed that revocation of certification violated their constitutional rights.

Cases where teachers were successful, or partly successful, in attempts to avoid decertification include those where a teacher's alleged sexual misconduct with a student was not proven by competent, substantial evidence;[270] where there was no evidence that the commission reviewing the revocation had examined an investigative file of evidence;[271] where a teacher was held entitled to an administrative hearing on his claim for restoration of his license;[272] and where it was affirmed that the state commissioner of education did not have the power to review a retroactive certification granted by the state department of education.[273]

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[267] Smith v. Andrews, 504 N.Y.S.2d 286 (App. Div. 1986).
[268] Wagschal v. Board of Examiners, 503 N.Y.S.2d 434 (A.D. 1986).
[269] Board of Educ. v. Singleton, 712 P.2d 1384 (N.M. Ct. App. 1985).
[270] Ferris v. Austin, 487 So. 2d 1163 (Fla. Dist. Ct. App. 1986).
[271] Fields v. Turlington, 481 So. 2d 960 (Fla. Dist. Ct. App. 1986).

In a case reported more fully in the subsection on discrimination based on religion, it was held that a teacher's refusal to discontinue wearing religious garb justified the revocation of her teaching certificate.[274] The Oregon Supreme Court held that the revocation, pursuant to statutory authority, was not intended as a punishment but was merely the result of teaching in a manner that was incompatible with maintaining the religious neutrality of the public schools.[275] And a Texas appeals court, assuming the existence of a constitutionally protected contract right, held that revocation of teaching certificates for failure to pass a competency test was a valid exercise of the state's police power.[276]

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[272] Lubin v. Board of Educ., 501 N.Y.S.2d 31 (App. Div. 1986).

[273] Board of Educ. v. Ambach, 499 N.Y.S.2d 499 (App. Div. 1986).

[274] Cooper v. Eugene School Dist. No.4J, 723 P.2d 298 (Or. 1986).

[275] It is assumed but not reported in this case, that Oregon does not require certification for teaching in private settings; if it did, revocation of the teacher's certification could be considered a punishment.

[276] Texas State Teachers Ass'n v. State, 711 S.W.2d 421 (Tex. Civ. App. 1986).

BARGAINING

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INTRODUCTION

This year's array of collective bargaining cases in education constituted a broad range of topics and holdings by the courts. There were no new legal principles applied in the collective bargaining cases. The courts relied on traditional labor law concepts and applied them to the specific statutes and policies of the applicable jurisdiction. There was no paucity of cases; the total number exceeded those in recent previous years.

CONSTITUTIONAL ISSUES

A plethora of education collective bargaining cases containing constitutional issues were decided by the American courts during 1986. The only collective bargaining case arising in the school context that was decided by the United States Supreme Court in 1986 was *Chicago Teachers Union, Local No. 1 v. Hudson,*[1] in which nonunion employees of a board of education brought suit challenging a procedure established pursuant to a collective bargaining contract for determining the amount of the agency shop, or "fair share," fee. Writing for a unanimous court, Justice Stevens ruled that under an agency shop agreement narrowly tailored procedural safeguards are necessary to prevent compulsory subsidization of ideological activity to nonunion employees who object to them, while at the same time not restricting the union's ability to require any employee to contribute to the cost of collective bargaining activities. The nonunion employee, whose first amendment rights are affected by the agency shop agreement and who bears the burden of objecting, is entitled to have his objections addressed in an expeditious, fair, and objective manner. In this case, the union procedure was found to contain three constitutional defects. First, it failed to minimize the risk that nonunion employees' contributions might be temporarily used for impermissible purposes. Second, it failed to provide nonmembers with adequate information about the basis for the proportionate share from which the advance deduction of dues was calculated. Third, it failed to provide for a reasonably prompt decision by an impartial decisionmaker. Generalizing from these defects, the Court held that the constitutional requirements for the union's collection of agency fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending.

In a subsequent and overlapping case, a federal district court in

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[1] 106 S. Ct. 1066 (1986).

Michigan heard a case brought by nonmembers of a teachers' union challenging the scope of and procedure for its agency shop fee.[2] As to the procedure for the fee, the court held that the nonmembers were entitled to the disclosure of actual, rather than merely budgeted, expenditures by the bargaining unit. Relying on the *Chicago Teachers' Union* decision, the court ruled that the union's procedures for nonmember challenges to the agency fee calculations were defective in that the procedures offered no assurances that nonmembers' funds would not be temporarily used for objectionable purposes, failed to disclose adequate information concerning the basis for the reduced fee calculation, and did not provide for a reasonably prompt hearing before an impartial decisionmaker. As to the scope of the fee, the court held on constitutional grounds that the union's expenses for lobbying, travel to state and national conventions, publications, and litigation were legitimately includable to the extent that they were germane to the union's duties as bargaining representative. On the other hand, the union's organizing expenses and its loans to support an affiliated union's strike were not constitutionally chargeable.

Other lower court cases also addressed the issue of the scope of an agency shop fee. In a case brought by a teachers' association to collect "fair share" representation fees from nonmembers, an Indiana appellate court held that the association's representation fee properly included expenditures used for the following purposes: to send representatives to annual conventions and workshops; to provide a dinner where building representatives were trained concerning the terms of the collective bargaining agreement; to provide an association luncheon for new teachers; to send a representative to a march in Washington, D.C.; to conduct social programs (including expenditures to honor retiring teachers); to conduct professional development workshops; to send payments to the association's state and national affiliates; and to cover miscellaneous expenses including floral arrangements and public relations.[3] Furthermore, in another case the same court held that nonmember teachers could constitutionally be required, pursuant to a collective bargaining agreement, to pay their fair share of the teachers' association expenses for organizing; lobbying (including the hiring of outside organizations for this purpose); legal, negotiating, and research services; and state and national affiliation.[4] Objecting nonmembers could not, however, be forced to pay for political or ideological activities unrelated to collective bargaining, contract administration, or the association's duties as the exclusive bargaining agent.

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[2] Lehnert v. Ferris Faculty Ass'n, 643 F. Supp. 1306 (W.D. Mich. 1986).

[3] Abels v. Monroe County Educ. Ass'n, 489 N.E.2d 533 (Ind. Ct. App. 1986).

[4] New Prairie Classroom Teachers Ass'n v. Stewart, 487 N.E.2d 1324 (Ind. Ct. App. 1980).

In a related case, the Massachusetts Supreme Court addressed two constitutional issues.[5] First, the court held that public employees who are not union members, but who may be required as a condition of their employment to pay an agency fee, have a constitutional right to prevent a union's spending a part of their service fee to contribute to political candidates and to express political views unrelated to its duties as exclusive representative. Second, the court ruled that the Massachusetts Labor Relations Commission's regulation providing a forty-five day limitation period on agency fee challenges was unconstitutional under the equal protection clause, in light of the six-month limitation period on other prohibited practice complaints.

The entirely separate issue of the constitutionality, under the fourth amendment, of drug testing was addressed in one New York case.[6] The specific issue was whether probationary teachers could be compelled to submit to investigatory urine testing even though there was no particularized indication that they currently or in the past had used illegal drugs. In reaching its ruling the court found that this drug testing did not fall within the collective bargaining agreement's provision that probationary teachers "fulfill the requirements for a medical examination and tuberculin test." Further finding that the proposed urine test was a search within the meaning of the fourth amendment, the court balanced the board of education's interest in ensuring that its employees are fit to perform their jobs against the teacher's expectation of privacy, concluding that the proper standard for requiring that a teacher submit to drug tests is particularized reasonable suspicion. The court noted that in the instant case there was "strikingly absent from the record even a scintilla of suspicion, much less a reasonable suspicion."[7]

Constitutional issues arose in discharge cases related to collective bargaining. The Tenth Circuit rejected a claim by a teacher that her discussion of a teacher's aide's time was constitutionally protected speech.[8] The court ruled that the speech was so disruptive that it was not entitled to first amendment protection. The court concluded, however, that there was sufficient evidence that the motivation for the nonrenewal of the faculty representative's teaching contract was in retaliation for her union activity to send that issue to the jury. In a California case, the state's intermediate, appellate court reversed a teacher's termination which had been based on a collective bargaining provision.[9] The provision specified that voluntary or involuntary absence without leave for five consecutive working days constituted automatic resignation. Starting from the principle that public employees have a property interest in continued employment, and thus are entitled to procedural due process before discharge, the court ruled that collective bargaining agreements may not contain provisions that abrogate employees' fundamental constitutional rights or their federal statutory rights.

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[5] Lyons v. Labor Relations Comm'n, 492 N.E.2d 343 (Mass. 1986).

[6] Patchogue-Medford Congress of Teachers v. Board of Educ., 505 N.Y.S.2d 888 (App. Div. 1986).

[7] *Id.* at 891.

[8] Sayre v. St. Vrain Valley School Dist. RE-1J, 785 F.2d 862 (10th Cir. 1986).

[9] Phillips v. California State Personnel Bd., 229 Cal. Rptr. 502 (Ct. App. 1986).

Procedural due process was also at issue in a federal case where a teacher, in a *pro se* proceeding, alleged that an inadequate grievance process constituted a violation of his due process rights.[10] The court found that the plaintiff neither claimed in his complaint nor subsequently showed that he was deprived of any liberty or property interest. Absent such an interest, no due process was appropriate, and the case was dismissed.

Similarly rejecting procedural due process as an issue, a Texas appeals court also granted a summary judgment against the alternative bases for a suit by noncontractual employees of a school district who had been denied a hearing before the board of trustees to review the superintendent's denial of their employment grievances.[11] The court found no violation of the state's right-to-work law nor the "redress of grievances" articles in the state constitution. Finally, the court rejected their first amendment claim, because any member of the general public or any employee of the school district could address the school district's board of trustees during its open sessions.

Several constitutional issues were presented in a Florida case.[12] The plaintiff unions challenged a merit school statute that provided economic incentives to employees at meritorious schools. The court held that this statute did not contravene teacher collective bargaining rights secured under the state constitution and that it was not an unconstitutional delegation of legislative authority. The plaintiffs also raised an equal protection claim, arguing that rewarding schools based on student performance on standardized exams bears no relationship to the goal of enhancing teaching. Based on the record presented, the court rejected this argument, finding a rational relationship to be conceivable. The plaintiff unions further challenged, on the basis of equal protection, a master teacher statute that provided incentive awards of not less than $3,000 to teachers who qualified. The court rejected this claim, finding the imperfections in this program to be reasonable rather than fatal.

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[10] Taverna v. Churchill, 638 F. Supp. 243 (D. Mass. 1986).

[11] Corpus Christi Indep. School Dist. v. Padilla, 709 S.W.2d 700 (Tex. Civ. App. 1986).

[12] Florida Teaching Profession v. Turlington, 490 So. 2d 142 (Fla. 1986).

AUTHORITY TO BARGAIN

Only one case in 1986 involved the authority to bargain, and it specifically addressed the issue of which governmental entity was authorized to bargain with higher education employees pursuant to Pennsylvania's passage of the State System of Higher Education Act.[13] Prior to the passage of the Act, the Commonwealth of Pennsylvania had been certified by the Pennsylvania Labor Relations Board (PLRB) as the employer of all managerial and professional employees of the state colleges and of Indiana University of Pennsylvania. After the Act, the PLRB ruled that the Commonwealth was the public employer but that the State System of Higher Education, through its chancellor, was authorized to conduct collective bargaining negotiations. The appellate court upheld the order, ruling that the State System of Higher Education was clearly designated as the public employer of the professional and managerial employees of the State System of Higher Education, and as such was authorized, through its chancellor, to conduct collective bargaining negotiations with representatives of the professional and managerial employees of these institutions. The court also ruled that the Commonwealth was not to be classified as a joint employer authorized to conduct collective bargaining with these employees.

RECOGNITION AND REPRESENTATION ISSUES

Unit Determination

Supervisory, Managerial, and Confidential Employees. Several unit determination cases were presented to state courts in 1986. The status of a range of employee roles, including supervisors and secretaries, were at issue under various state collective bargaining statutes.

In an Indiana case, an appellate court held that three new professional positions (viz., football statistician, guidance coordinator, and computer coordinator) were excluded from the bargaining unit under a state statute that allowed for a unit composed of personnel who have "no administrative or supervisory responsibilities."[14] Reasoning that a court should give a word, in this case "administrative," its plain and ordinary meaning when it was not defined in the statute, the court held that the school board had no obligation to bargain with the teachers' association over the three positions.

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[13] Board of Governors of State System of Higher Educ. v. Commonwealth, 514 A.2d 223 (Pa. 1986).

[14] Board of Trustees v. Indiana Educ. Employment Relations Bd., 498 N.E.2d 1006 (Ind. Ct. App. 1986).

Similarly, a Michigan appellate court excluded a coordinator of gifted and talented from a teachers' bargaining unit, ruling that her position was supervisory because she had been delegated the authority to recommend hiring of certain individuals and to direct members of her staff.[15] The court reasoned that it was "not the exercise of authority, but the delegation of authority which was indicative of the attributes of a supervisor,"[16] and that it was insignificant that some of the coordinator's powers had not been exercised or come to fruition.

In another case concerning supervisory status, school supervisors who were not members of the professional employees' association brought suit in Wisconsin court for injunctive relief and return of monies collected pursuant to a fair-share deduction clause in the collective bargaining agreement. Finding that the legislature specifically excluded school supervisors from the applicable collective bargaining statute, the appeals court ruled that the fair share deductions be returned to these excluded employees.[17]

The status of certain school district secretaries was at issue in an Illinois case where the court ruled that the school principals' secretaries were qualified to be in a bargaining unit of secretaries, because "confidential employees" were defined as working for "managerial employees" and the principals that they worked for were not "managerial employees."[18] The secretary to an assistant superintendent was found to be a confidential employee, however, because the assistant superintendent "formulated, determined, and effectuated policy" with regard to labor relations.

Finally, the status of part-time employees was at issue in a Minnesota case.[19] The appeals court found that the term "normal work week" as used in the applicable statute for determining whether part-time employees could be included in collective bargaining units, referred to the normal, predominant work week of full-time employees. Noting that the state legislature, in enacting the collective bargaining statute, was concerned with maintaining the integrity of bargaining units by excluding part-time workers who tend to have little in common with full-time workers, the court held that the plaintiff part-time employees were excluded from the bargaining unit.

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[15] Michigan Educ. Ass'n v. Clare-Gladwin Intermediate School Dist., 396 N.W.2d 538 (Mich. Ct. App. 1986).

[16] *Id.* at 541.

[17] Perry v. Milwaukee Bd. of School Directors, 388 N.W.2d 638 (Wis. Ct. App. 1986).

[18] Board of Educ. v. Illinois Educ. Labor Relations Bd., 493 N.E.2d 1130 (Ill. App. Ct. 1986).

[19] Independent School Dist. No. 721 v. School Serv. Employees Local 284, 379 N.W.2d 673 (Minn. Ct. App. 1986).

Other Representation and Recognition Issues. In a California case, the union brought suit on behalf of two temporary teachers who were members of the bargaining unit but not members of the union.[20] The state's intermediate appellate court overturned the trial court's decision that the union had no standing in the case. The appellate court held that the union could bring representative action even if, at the time of the action, the affected employee was not a member of the union or the union was no longer the exclusive representative.

In another California case, the state's highest court ruled that medical housestaff, who were M.D.'s participating in the University of California's residency programs, were "employees" under the California Higher Education Employer-Employee Relations Act and were therefore entitled to collective bargaining rights.[21] While the residents were also students of the University, the standard for determining their employee status was whether their educational objectives were subordinate to the services they performed and whether according them collective bargaining rights would further the purposes of the Act. The court ruled that they met both standards.

Union recognition at a church-related university was the subject of a case decided by the First Circuit Court of Appeals.[22] The university had been founded by the Dominican Order of the Roman Catholic Church and was located on the grounds of a Dominican seminary. The majority of its board of trustees were required to be members of the Dominican Order. Despite these religious aspects, however, the university defined its objective as "humanistic education at an academic level," and in recruiting students of all creeds, it had an open admissions policy. Attendance at Mass was optional. Only one theology course was required, which focused on the historical and literary analysis of the Bible. The faculty, who were hired on the basis of experience and ability rather than religious affiliation, voted in favor of union representation, but the university refused to bargain. In response to bargaining order by the National Labor Relations Board (NLRB), the university contended that, under Supreme Court precedents,[23] the NLRB had no jurisdiction over the university. Rejecting this contention and distinguishing these decisions, the First Circuit held that the NLRB's jurisdiction over the university was proper and would not create a risk of violating either the establishment clause or the free exercise clause of the Constitution. In view of the above mentioned facts, the court found that the university had religious functions, but its predominant higher education mission was to provide students with a secular education.

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[20] Anaheim Elementary Educ. Ass'n v. Board of Educ., 225 Cal. Rptr. 468 (Ct. App. 1986).

[21] Regents of Univ. of Cal. v. Public Employment Relations Bd., 715 P.2d 590 (Cal. 1986).

[22] Universidad Cent. de Bayamon v. NLRB, 793 F.2d 383 (1st Cir. 1985).

[23] NLRB v. Catholic Bishop, 440 U.S. 490 (1979); Lemon v. Kurtzman, 403 U.S. 602 (1971).

Elections

Of the three cases in 1986 that dealt with representation elections, two were decided by the Oklahoma Supreme Court. In the first, the court addressed the issue of the proper role of the school board in resolving competing claims of rival labor organizations seeking to represent the district's teachers.[24] The court held that the school board had an affirmative nondiscretionary duty to participate in the settlement of unresolved disputes between competing bargaining organizations. Inasmuch as the state's collective bargaining statute mandated a specific procedure for selecting the bargaining representative in districts with 35,000 students or more, but not for those with under this enrollment level, the court was faced with a "gap in the law" rather than mere statutory interpretation. Reasoning that the overriding legislative intent is the desirability of some orderly process for regulating collective bargaining in education, the court applied the election procedures outlined for school districts of 35,000 or more to districts with less than that level. Finally, noting that the collective bargaining statute provided no sanctions for violations of its provisions, the court ruled that a writ of mandamus was not only a proper form of relief, it may well have been the only adequate remedy.

In the second Oklahoma election-related case, the teachers' association sought a writ of mandamus to require the board of education to either recognize them as the bargaining agent for the teachers based on authorization cards or to call an election.[25] The school board counter-argued that, based on a ruling in the preceding case, recognition elections must be by secret ballot and that the association's request for an election was not timely. The Oklahoma Supreme Court ordered the school board to immediately examine and tabulate the authorization cards that had been submitted to it by the association and to either grant or withhold recognition of the association based on the majority of those votes. The court held that the new law did not retroactively invalidate the selection of representatives by the authorization-card method, because traditionally all but two school districts in the state had relied on this less costly, less formal method; therefore, declaring the procedure void in the instant case could have the effect of creating chaos throughout the state.

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[24] Maule v. Independent School Dist. No. 9, 714 P.2d 198 (Okla. 1986).

[25] DeLafleur v. Independent School Dist. No. 11, 727 P.2d 1352 (Okla. 1986).

In an Indiana case, the current exclusive representative of a school district's employees brought action challenging the state Education Employment Relations Board's (EERB) order that a third runoff election be conducted between the district and another association.[26] The trial court had issued a preliminary injunction against the third election pending a trial on the merits to determine whether such an election was proper. The appellate court reversed, holding that the association had failed to exhaust its administrative remedies and, thus, that the trial court lacked jurisdiction to issue the injunction. Furthermore, the association had failed to show that it would suffer irreparable harm should the third election take place. Indeed, the court pointed out that if the association had won the election there would have been no harm whatsoever, and if it lost the election it could appeal its decertification to the full EERB and then seek judicial review.

RIGHTS AND OBLIGATIONS OF EXCLUSIVE BARGAINING REPRESENTATIVE

Union Rights

The University of California sought review of a decision by the state's PERB that the university had acted unreasonably in denying a labor union access to official banner space on campus.[27] The state's intermediate appellate court ruled in favor of the University, reasoning that a statute granting unions the right of access to employees of public higher education institutions did not apply to every possible means of such access. The court also found that denying the union the use of the banner space was not unreasonable, because to have permitted such use would have violated a statutory prohibition against showing preference to one employee union over another.

In an entirely different context, the District of Columbia Court of Appeals remanded for further explanation or reconsideration a case in which a union representing nonsupervisory professional personnel in the Department of Defense Dependents Schools requested data concerning both the bargaining unit and managerial employees in order to ascertain whether a disparate treatment argument might be used in an employee's behalf.[28] The court ruled that the Federal Labor Relations Authority failed to adequately supply a reason why a supervisor's disciplinary sanctions for the same offense as unit employees was not relevant to the employee's case.

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[26] Scott County Fed'n of Teachers v. School County School Dist., 496 N.E.2d 611 (Ind. 1986).

[27] Regents of Univ. of Cal. v. Public Employment Relations Bd., 223 Cal. Rptr. 127 (Ct. App. 1986).

[28] North Germany Area Council, Overseas Educ. Ass'n v. Federal Labor Relations Auth., 805 F.2d 1044 (D.C. Cir. 1986).

Obligations of Exclusive Representatives

Unions are required, as part of their obligations as exclusive representatives of their members, to fulfill certain duties. A few cases in 1986 related to one of these obligations: the duty of fair representation.

In a Connecticut case, an administrator brought an action against the board of education and his union.[29] The teacher alleged that the union had breached its duty of fair representation by failing to process his grievance through binding arbitration. The union had processed his grievance through the first three steps of the contractual grievance procedure. The grievance had been denied at each step, with representatives of the board explaining that under the collective bargaining agreement the plaintiff's recall rights had expired one year after his demotion from principal to teacher. On the advice of its counsel, the union decided not to take the matter to binding arbitration. Connecticut's highest court ruled in favor of the union, declaring that "in fulfilling the duty to fairly process legitimate grievances of individual employees, a union must be given the discretion to winnow out frivolous claims prior to the most costly and time consuming step in the grievance procedure."[30]

A similar holding was reached in a parallel New York case.[31] The plaintiff, a principal and member of the defendant union, had applied for a longevity increment. The school district denied the application, informing the plaintiff that he had to retire in order to be eligible for the increment. Despite its belief that the grievance was meritless, the union nevertheless assisted the plaintiff through the first three stages of the contract's grievance procedure. Thereafter, the union's executive board submitted the issue of whether to proceed with arbitration to the union's membership, which voted not to pursue arbitration. The plaintiff then filed suit against the union, alleging breach of its statutory duty of fair representation. The court found that there was no such breach in the absence of discrimination, arbitrariness, or bad faith on the part of the union. The court clarified that a union is not required to carry every grievance to the highest level; it must be permitted to assess each grievance with a view of its individual merits and its consistency with prior and pending grievance cases.

The duty of fair representation was considered incidentally in the aforementioned[32] Massachusetts case where a teacher alleged that the school board did not process his grievance fairly.[33] While ruling that the teacher failed to exhaust the remedies available under the collective bargaining agreement, the court noted that even if the plaintiff could have been deemed to have exhausted the grievance process, or even if his failure to do so could be excused, any claims based upon the collective bargaining agreement should be dismissed on the grounds that the plaintiff had brought the action without the support of the association. Without showing that the association had breached its duty of fair representation, a member cannot sue his employer in Massachusetts without the support of his union.

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[29] Masto v. Board of Educ., 511 A.2d 344 (Conn. 1986).

[30] *Id.* at 347.

[31] Symanski v. East Ramapo Cent. School Dist., 502 N.Y.S.2d 209 (App. Div. 1986).

[32] See *supra* note 10 and accompanying text.

This duty also arose as a secondary or contingent matter in a New York case where a terminated teacher petitioned for a writ of mandamus directing the chancellor of the board of education to restore his teaching license and to compel his reinstatement as a teacher.[34] The appellate court ruled that the teacher was entitled to an administrative determination, but that he could not compel arbitration because he was not a party to the agreement between the school board and the teachers' union. According to the court, the teacher's only remedy would have been to sue his union to determine whether it had lived up to its fiduciary obligation to represent him fairly.

SCOPE OF BARGAINING

Mandatory Topics of Bargaining

Several cases in 1986 dealt with mandatory topics of bargaining. Most of these cases reflected a trend favoring mandatory negotiability. In a Florida case, the court held that supplemental pay for coaching duties performed by teachers was a "wage" under that state's collective bargaining statute and, as such, was a mandatory subject of bargaining.[35] Similarly, Iowa's highest court held that subjective criteria for teacher evaluations and the right to grieve teacher evaluations were mandatory subjects of bargaining under that state's statute.[36] Likewise, the Kansas Supreme Court ruled that the manner of distribution of the surplus health insurance premiums that had accrued under a group health insurance plan, pursuant to a collective bargaining agreement, was mandatorily negotiable.[37] However, since the surplus was the result of a previously negotiated contract which also had specified the method of distribution of a divisible surplus, further negotiation on the distribution was inappropriate.

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[33] Taverna v. Churchill, 638 F. Supp. 243 (D. Mass. 1986).

[34] Lubin v. Board of Educ., 501 N.Y.S.2d 31 (App. Div. 1986).

[35] School Bd. v. Levy County Educ. Ass'n, 492 So. 2d 1140 (Fla. Ct. App. 1986).

[36] Aplington Community School Dist. v. Iowa Pub. Employment Relations Bd., 392 N.W.2d 495 (Iowa 1986).

[37] Board of Educ. v. Kansas-Nat'l Educ. Ass'n, 716 P.2d 571 (Kan. 1986).

A Michigan case added a surprising entry on the mandatory side of the ledger.[38] In this case, a school system had unilaterally changed one of its practices regarding health insurance, which had actually been contrary to the collective bargaining agreement, to bring it in line with the agreement. The question raised on appeal was whether an employer must bargain about a subject explicitly covered by a contract where the employer had established a practice contrary to the contractual language or whether instead it could unilaterally revert to enforcing the language of the collective bargaining agreement. The court ruled that the school district was required to provide the union with notice and an opportunity to bargain before making changes involving a mandatory subject of bargaining, even though the employer had changed its traditional practice so that it would no longer be contrary to the collective bargaining agreement.

Permissive Topics of Bargaining

Only two entries appeared in 1986 on the permissive side of the ledger. In a Maryland case, the teachers' association claimed that under state statute the school board was required to negotiate with it with respect to the school calendar and the reclassification of employees.[39] The court reasoned that these issues were somewhat related to salaries, wages, and hours but were significantly related to educational policy and therefore were subject to permissive, not mandatory, bargaining. Similarly, a New York court held that, under that state's statutory framework, while a school board could not be deprived of its right to determine the qualifications of its teachers, the procedures to be utilized in filling vacancies is a permissive subject of bargaining.[40] Therefore, pursuant to the parties' existing contract, the seniority of equally qualified teachers could, but not must, properly be a subject of collective bargaining negotiations.

Prohibited Topics of Bargaining

In another New York case, the court went a step further, holding that a provision in a collective bargaining agreement that required the school district to hire only persons within the bargaining unit to fill vacancies, with no provision for judging the qualifications of the applicants, violated public policy and, thus, was unenforceable.[41]

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[38] Mid-Michigan Educ. Ass'n v. St. Charles Community Schools, 389 N.W.2d 482 (Mich. Ct. App. 1986).

[39] Board of Educ. v. Montgomery County Educ. Ass'n, 505 A.2d 905 (Md. Ct. Spec. App. 1986), *cert. granted*, 505 A.2d 905 (Md. 1986).

[40] Dutchess County Bd. of Coop. Educ. Serv. v. Newman, 505 N.Y.S.2d 711 (App. Div. 1986).

GRIEVABILITY AND ARBITRABILITY

Presumption of Arbitrability

Several arbitrability cases arose in New York, which has a strong public policy exception to comprehensive binding grievance arbitration. Where public policy matters are not the subject, however, the general presumption in favor of arbitration applies. Consider, for example, the 1986 case in which the trustees of a community college denied a promotion to an instructor who lacked a master's degree in his field.[42] When he grieved, the college sought a court stay to prevent arbitration of the grievance. The court ruled that the resolution of a dispute over the college's requirement of a master's degree as an indispensable condition of promotion depended purely on interpretation of the collective bargaining agreement, evincing a clear intention to arbitrate. In another such case, a school district sought to stay arbitration of a grievance relating to an alleged violation of the transfer and promotion provisions of a collective bargaining agreement.[43] New York's intermediate appellate court ruled that the topic of this grievance was included in the grievance procedure of the collective bargaining agreement and that, since it was not prohibited by the state law or by public policy, it was arbitrable. The court also ruled that the effect of collateral estoppel, based on prior litigation on voluntary transfers, was a matter that was outside the scope of judicial inquiry and within the exclusive province of the arbitrator. As a final example in this line of New York cases, the same court preliminarily reviewed the merits to determine the arbitrability of a grievance filed on behalf of a teacher whose application for a grant of sick leave from a "sick leave bank," established pursuant to a collective bargaining agreement, was rejected by the school board's designated representative to the sick leave bank governing committee.[44] The collective bargaining agreement contained a provision that the committee's decisions were "final"; however, when a rejection was "deemed totally without justification," it could be submitted for nonsubstantive arbitral review. The court denied the stay of arbitration, finding that the grievance was subject to review by the arbitrator because the committee's decision in this case was without procedural as well as substantive justification.

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[41] Enlarged City School Dist. v. Troy Teachers' Ass'n, 501 N.Y.S.2d 955 (App. Div. 1986).

[42] County of Broome v. Croll, 499 N.Y.S.2d 18 (App. Div. 1986).

[43] East Ramapo Cent. School Dist. v. East Ramapo Teachers' Ass'n, 498 N.Y.S.2d 4 (App. Div. 1986).

[44] Board of Educ. v. Middletown Teachers Ass'n, 497 N.Y.S.2d 429 (App. Div 1986).

Two 1986 decisions appeared on the "public policy" side of New York's arbitrability analysis. In one case, a teacher had not obtained a teaching certificate within one year, which had been required by an education hearing panel, in order for him to retain his position.[45] The appellate court held that the teacher and the union were not entitled to arbitration where the issue had already been solved through litigation. That the teachers' union alone had been the party to the arbitration and that it had not been a party to the teacher's prior litigation did not, in the court's view, entitle the union to arbitration in a case in which the interest of the union and the interest of the teacher were identical. In the other case, the same court held that since the sole issue submitted to the arbitrator was whether the clause in the collective bargaining agreement discriminated on the basis of marital status, the issue encompassed a nonarbitrable matter of public policy.[46] The court concluded that the determination of the issue should be raised before either the courts or the state's Human Rights Commission.

Arbitrability cases also arose in other jurisdictions. In an Illinois case, the collective bargaining agreement required arbitration of all unresolved grievances, and a state statute provided a specific method for determining the sequence of reduction-in-force, unless an alternative method was established in a collective bargaining agreement between the board and teachers' association.[47] Given that express statutory authority, the court held that a grievance resulting from the board of education's reduction in the number of tenured teachers presented arbitrable issues, which included whether the reduction-in-force had in fact been the result of economic conditions, whether the administrative consequences of the board's determination had been properly applied, and whether teachers had been laid off in the proper manner.

The relationship between negotiability and arbitrability was reflected in another case in which a university in Ohio had entered into custodial service contracts with independent contractors at the same time that the university had imposed a hiring freeze on civil service custodial personnel.[48] The Ohio Supreme Court sharply admonished the university, stating: "[c]ivil servants, themselves, are thus in a position to

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[45] Smith v. Andrews, 504 N.Y.S.2d 286 (App. Div. 1986).

[46] Fallon v. Greater Johnstown School Dist., 499 N.Y.S.2d 503 (App. Div. 1986). For related decisions, see *infra* notes 68-69 and accompanying text.

[47] Board of Educ. v. Crete-Monee Educ. Ass'n, 497 N.E.2d 1348 (Ill. App. Ct. 1986). For other pro-arbitrability decisions, see *infra* notes 70-71 and accompanying text.

[48] Local 4501, Communications Workers of Am. v. Ohio State Univ., 494 N.E.2d 1082 (Ohio 1986).

'protect,' the civil service system at the bargaining table; and public employers no longer have a 'free hand' to dismantle a civil service personnel system by enforcing a hiring freeze in conjunction with the letting out of independent contracts."[49] The court, after finding that the matter was one that pertained to "wages, hours, or terms and other conditions of employment," held that the issue was a proper subject of collective bargaining and as such should be resolved through arbitration.

Who Determines?

Several cases in 1986 involved the multi-faceted issue of who makes the decision where arbitration may be a possible forum. As to the arbitrability aspect, the cases in the immediately preceding section of this chapter reveal that courts sometimes make the initial determination and always have the power to make the final determination as to whether a grievance is arbitrable. Other cases address the dual or multiple forum aspect (i.e., whether arbitration or another forum—typically the courts or an administrative agency—should decide a particular dispute).

The choice of forum between arbitration and the courts arose at the end of a Maryland case in which teachers whose certificates had been reclassified from first to second class filed grievances which the county superintendent refused to consider.[50] By state statute, the state board of education was delegated the authority to interpret the provisions of the education code within its jurisdiction and to decide all disputes arising thereunder. The same statute also provided for the right to timely appeal the decision of a county superintendent successively to the county board and to the state board of education. The state's appellate court overturned the trial court's and arbitrator's decisions in this case, ruling that the teachers had not first pursued and exhausted their administrative remedy of an appeal to the state board of education. The court added, however, that once those statutory interpretation questions were resolved through the administrative and judicial review processes, a teacher in the school district could elect either the remedy of arbitration or judicial review.

This choice of forum was more central in a suit brought by a part-time teacher against a school board in Illinois.[51] The collective bargaining agreement with the school district provided that the board recognize the association as the exclusive representative of "all regularly employed full-time certified employees and all 'regularly' part-time certified employees who are employed for four or more hours per school day."[52] While the teacher had previously been a full-time employee, she was currently employed in a two-fifths time position. The appellate court held that the teacher was not restricted to the grievance and arbitration procedure of the collective bargaining agreement and that alternatively she could resolve her dispute through the courts.

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[49] *Id.* at 1086.

[50] Board of Educ. v. Hubbard, 506 A.2d 625 (Md. 1986).

[51] Ballard v. Board of Educ., 489 N.E.2d 896 (Ill. App. Ct. 1986).

The sequence of the arbitration and judicial forums was the focus of cases in other jurisdictions. In a Washington case, a custodian alleged breach of contract after a position for which he applied was given to an employee with less seniority.[53] The appellate court held that while the trial court does not have automatic jurisdiction in such cases, in that the parties are required to follow dispute resolution methods for which they have contracted before they resort to the courts, in this instance the case was properly before the court. The applicable statute provided that arbitration or mediation was valid and irrevocable if the employee and employer agreed to submit to mediation arbitration. In this case the parties had agreed to mediation, but when they attempted to have the state's PERC mediate, this agency refused. Additionally, this court proceeding ensued a number of years after the other applicant assumed the head custodians position. Under these circumstances the court held that the grievance procedures set forth by the contract were substantially complied with, and that the case was properly before the courts.

A clearer example of the sequencing issue is a Connecticut case in which the trial court enjoined a school district from terminating the employment contracts of ten school administrators and from eliminating nine administrative positions. On appeal, the Connecticut Supreme Court ruled that the plaintiff employees had failed to exhaust the exclusive grievance and arbitration procedures established in their collective bargaining agreements before seeking redress in the courts and that their suit should be dismissed for lack of jurisdiction.[54] Similarly, in Illinois and Texas cases, the appellate courts held that the school employees were required to exhaust administrative remedies, including arbitration, before seeking relief in the courts.[55]

Two Minnesota cases further clarify the differential importance, depending on the circumstances, of exhausting the arbitral forum before proceeding to the judicial forum. In one Minnesota case, a teacher had been placed on unrequested leave (i.e., RIFed at the end of the school year).[56] The teacher then sought judicial review of the school district's decision. Pointing out that the collective bargaining agreement between the teachers and their employer provided a grievance procedure under which teachers could grieve the accuracy of the school district's seniority list, the state's highest court ruled that the teacher's failure to utilize the grievance procedure precluded her from later seeking judicial review of the school board's decision to place her on unrequested leave. The board's decision had been based on the seniority list, and the list was treated as final and binding on the parties by reason of the teacher's failure to grieve. In the contrasting Minnesota case, the plaintiff, Pirotta, was "bumped" after a court decision that held that another teacher had more seniority than he did. Under those circumstances, the state's highest court ruled that the alleged violation arose when Pirotta was bumped, not when the seniority list was posted.[57] Accordingly, Pirotta could not have waived his claim of seniority by failing to grieve the seniority list. The court also rejected the school district's collateral estoppel argument relating to the prior litigation.

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[52] *Id.* at 897.

[53] Yaw v. Walla Walla School Dist. No. 140, 722 P.2d 803 (Wash. 1986).

[54] School Adm'rs of New Haven v. Dow, 511 A.2d 1012 (Conn. 1986).

[55] Patterson v. Carbondale Community High School Dist. No. 165, 494 N.E.2d 240 (Ill. App. Ct. 1986); Houston Indep. School Dist. v. Houston Fed'n of Teachers, 715 S.W.2d 369 (Tex. Cir. App. 1986). The Illinois decision enumerated exceptions of futility or repudiation.

Other cases illustrate the issue of the choice of forum between arbitration and an administrative agency. In 1986, the Michigan courts reversed their posture in decisions regarding who should decide disputes involving school districts and their employees that are subject to arbitration and a Michigan Employment Relations Commission (MERC) proceeding. In May of 1986, the Michigan Court of Appeals held that where one dispute is subject to both contractual arbitration and a MERC proceeding, the MERC decision is dispositive to the extent that the dispute lies within MERC's jurisdiction.[58] In September that decision was vacated[59] in light of a new decision by the Michigan Supreme Court.[60] In the latter decision, the state's highest court held that: (1) the filing of an unfair labor practice claim with MERC does not preclude an arbitrator from resolving a breach of contract claim arising out of the same controversy; (2) MERC does not have jurisdiction over breach of contract claims unless the asserted breach of contract constitutes complete renunciation of the collective bargaining relationship; (3) the state's public collective bargaining statute neither expressly nor impliedly denied employees the right to pursue contractual grievances by requiring that proceedings relating to unfair practices be conducted by

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[56] Blank v. Independent School Dist. No. 16, 393 N.W.2d 648 (Minn. 1986).

[57] Pirotta v. Independent School Dist. No. 347, 396 N.W.2d 20 (Minn. 1986).

[58] Flint School Dist. v. United Teachers of Flint, 388 N.W.2d 355 (Mich. Ct. App. 1986).

[59] Flint School Dist. v. United Teachers of Flint, 393 N.W.2d 176 (Mich. 1986).

[60] Bay City School Dist. v. Bay City Educ. Ass'n, 390 N.W.2d 159 (Mich. 1986).

MERC; (4) conflicting arbitration awards will not be enforced when the right being asserted is "identical" to the right that has been adjudicated by MERC, and a right is identical when precise determinations necessary to establish a protected conduct in either forum is the same; (5) an arbitration hearing is required on a claim that the school board violated the collective bargaining agreement before it can be determined whether rights guaranteed by the agreement are identical to rights protected by the Act; and (6) in this case there was no conflict between the decisions of MERC that the school district did not violate the statute and the decisions of arbitrators that employees should be reinstated pursuant to the collecting bargaining agreement and, thus, the arbitration decisions were enforceable.

Finally is the choice of forum between administrative agencies and courts where arbitration is or cannot be sought. In New Jersey, for example, the appellate court decided the case of a teacher who sought to receive credit for teaching experience in another school district after she was transferred from a basic skills instructor to a regular teaching position.[61] The court held that upon the refusal of the board of education to comply with nonbinding arbitration, the proper forum was the court. The court, rather than the Commissioner of Education, had jurisdiction to interpret collective negotiations agreements where the only dispute between the local board of education and the teachers' union was the legal interpretation of the collective bargaining agreement provisions. As another example, in an Oregon case, teachers who had been disciplined following an out-of-school alcohol-related automobile accident brought suit against the school district for invasion of privacy, outrageous conduct, and breach of contract.[62] The appellate court held that the state's Employment Relations Board (ERB) had exclusive jurisdiction over any breach of agreement between the school district and the teachers' union and, thus, that the teachers could not initially resort to the courts in such cases. The proper route under Oregon law was to file an unfair labor practice with the ERB. As another variation on this same theme, the New Hampshire Supreme Court held that an allegation of wrongful demand to arbitrate charged an unfair labor practice, and as such in that state fell within the exclusive jurisdiction of the Public Employees Labor Relation Board.[63]

Procedural Issues

The grievance and arbitration process in the collective bargaining agreement typically includes procedural requirements. The rigor with which the courts regard these purported requirements vary. The types of procedural requirements also vary.

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[61] Belleville Educ. Ass'n v. Belleville Bd. of Educ., 506 A.2d 1276 (N.J. 1986).
[62] Trout v. Umatilla County School Dist., 712 P.2d 814 (Or. Ct. App. 1985).
[63] School Dist. v. Murray, 514 A.2d 1269 (N.H. 1986).

A New York case reveals two types of procedural requirements, written formality and time limits.[64] The appellate court interpreted both rigorously, first finding that a community college president prematurely proceeded to the fourth step of a contractual grievance procedure, appealing a grievance board's decision to the county executive. The collective bargaining agreement provided that an appeal of the grievance board's decision had to be in writing and had to include all relevant considerations and facts that led to the decision, along with the reasons for dismissal or, if the grievance was sustained, the remedy. Because no written decision had yet been issued by the grievance board when the decision was appealed, the county executive's fourth-step decision was determined by the court to have no effect on the parties. Furthermore, the fourth-step decision had not been issued within fifteen days after receiving the grievance board's decision, as required by the collective bargaining decision, and the court determined that the purported waiver of the fifteen day time limit was ineffective.

Timing was also the essence of a Pennsylvania case, in which thirteen months after a teacher aide's job was adjusted she was furloughed.[65] The arbitrator ordered her reinstated with back pay, and the school district appealed. The arbitrator concluded that the matter had become ripe for protest thirteen months earlier, when the aide's duties were reassigned, but held that the matter was nonetheless arbitrable as a continuing grievance. Because the timeliness of the grievance was covered by the contract, and therefore squarely committed to the arbitrator's discretion, the court upheld the arbitrator's decision. The court obviously felt some reservations, but stated that "judicial disagreement with the arbitrator does not rise to the level of judicial outrage."[66]

Management Prerogatives as a Bar

Management prereogatives serve as a bar to prevent various subjects from being processed in the grievance and arbitration process. Thus, this section overlaps with the preceding Presumption of Arbitrability section.

In two New York cases decided in 1986, the courts supported school board claims that the topic in dispute was within the board's exclusive management prerogative. In the first case, the court held that decision making regarding teaching assignments was the employer's responsibility and could not be delegated or subverted by bargaining agreements or arbitrators.[67] In the second, another New York court held that although a collective bargaining agreement required just cause for the discharge and discipline of school employees, that agreement could not alter the fact that the power was vested solely with the superintendent.[68]

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[64] Adjunct Faculty Ass'n v. Purcell, 506 N.Y.S.2d 894 (App. Div. 1986).

[65] Conneaut School Serv. Personnel Ass'n v. Conneaut School Dist., 508 A.2d 1271 (Pa. Commw. Ct. 1986).

[66] *Id.* at 1275.

In contrast to New York's broad "public policy" exception to arbitration, two cases from other jurisdictions illustrate the smaller scope of the management prerogatives bar in many states. In a Massachusetts case, the state's highest court held that decisions about the granting of sabbatical leaves were not within the management's prerogative and, thus, were subject to the arbitrator's authority.[69] In an Illinois case, the appellate court noted in dictum that the determination of faculty qualifications was one of the nondelegable discretionary powers of the board of trustees of the college.[70] Here, however, the question presented to the arbitrator was not whether a grievant was qualified, but whether the decision of the board of trustees was actually favoring one employee over another under the guise of a qualification decision. The employer's decision was found to be arbitrable, despite the employer's claim of managerial prerogative.

JUDICIAL REVIEW

Arbitration Awards and Employment Relations Board Rulings

Standard of Review. Generally, an arbitrator's award is enforceable so long as, at least with regard to factual as compared to legal matters, it draws its essence from the collective bargaining agreement. Most of the 1986 cases adhered to that legal principle.

In a Massachusetts case, as a broad example, the appellate court upheld an arbitrator's award, finding that his interpretation of the collective bargaining agreement was not lacking in reason.[71] Noting that it is possible that the arbitrator's award was wrong, the court held that, absent fraud, a court may not pass on an arbitrator's alleged errors of fact or law. In another Massachusetts case the state's highest court upheld an arbitration award in a teacher dismissal case.[72] The court ruled that the arbitrator's use of a "just cause" standard, which was allegedly broader than the "good cause" standard required by the teacher dismissal statute, was appropriate where the school committee had agreed in a collective bargaining contract that no teacher was to be dismissed without "just cause." Thus, the court found that the arbitrator's award drew its essence from the collective bargaining agreement and that the decision to reinstate the teacher without back pay did not exceed the arbitrator's power.

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[67] *In re* Brighton Cent. School Dist., 505 N.Y.S.2d 522 (Sup. Ct. 1986).

[68] Stoetzel v. Wappingers Cent. School Dist., 499 N.Y.S.2d 788 (App. Div. 1986).

[69] School Comm. v. Watertown Teachers' Ass'n, 491 N.E.2d 615 (Mass. 1986).

[70] Board of Trustees v. Cook County College Teachers Union, Local 1600, 487 N.E.2d 956 (Ill. App. Ct. 1986).

[71] School Comm. v. Quincy Educ. Ass'n, 491 N.E.2d 672 (Mass. App. Ct. 1986).

As another potent example, consider an Indiana case where a school district sought to have an arbitrator's award vacated because, it claimed, the arbitrator slept while one of the district's expert witnesses testified.[73] The court refused to set aside the arbitrator's claim, holding that the arbitrator's award was enforceable so long as it drew its essence from the collective bargaining agreement, and that the school district failed to show prejudice by the arbitrator's alleged sleeping during testimony because the witness was only one of several witnesses who testified on the same subject.

Other cases illustrate institutional prerequisites or standards in various jurisdictions for judicial review of an arbitral award. For example, in an Indiana case a trial court ordered arbitration between a school district and the teachers' association, and the school district appealed.[74] The appellate court held that the order compelling arbitration was a final order because such an order had fully decided the issue before the court. As a final order, it was appealable. Similarly, in Pennsylvania a school district filed a petition for review of an award that was rendered by a second arbitrator in favor of a teachers' association after the first arbitrator had been discharged.[75] The appellate court held that it would be improper for the court to interfere with the decision of an arbitrator on such grounds, where the procedure agreed upon by the parties permitted dismissal of an arbitrator and the appointment of another. However, the case was remanded for an evidentiary hearing, findings, and conclusions at the trial court level. After such a hearing, the court could review the award to determine whether it was drawn from the essence of the collective bargaining agreement.

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[72] School Comm. v. Needham Educ. Ass'n, 500 N.E.2d 1320 (Mass. 1986).

[73] Fort Wayne Community Schools v. Fort Wayne Educ. Ass'n, 490 N.E.2d 337 (Ind. Ct. App. 1986).

[74] Evansville Vanderburgh School Corp. v. Evansville Teachers' Ass'n, 494 N.E.2d 321 (Ind. 1986).

[75] Bensalem Township School Dist. v. Bensalem Township Educ. Ass'n, 512 A.2d 802 (Pa. 1986).

Other 1986 cases concerned the review of decisions by administrative agencies. Exemplifying the prevailing review standard in such cases, a Maryland appellate court held that a court may not substitute its judgment for that of the findings of fact by the state board of education in an unfair labor practice challenge; rather it must only determine if there was substantial evidence to support the agency's findings.[76] If the court finds that there is such evidence, the findings must be affirmed even if the court disagreed with them and would not have reached the same conclusion.

For procedural matters, the review standard typically is "abuse of discretion." For example, two teachers filed a complaint with the Pennsylvania Labor Relations Board after they were furloughed, allegedly because of a cut in federal funding. The PLRB found the school district guilty of unfair labor practices. Exceptions to the proposed order were posted by the school district twenty-two days later, two days beyond the twenty-day statutory period. The PLRB dismissed the exceptions for untimeliness. However, the court found that the district had justifiably delayed its exceptions, because the hearing examiner had created a mistaken assumption on the district's part that there would be a second hearing.[77] According to the court, the PLRB had the power to hear the exceptions, and its failure to do so, despite the actions by the hearing examiner which had contributed to the late filing of the exceptions, was adequate support for a finding, as a matter of law, that the PLRB abused its discretion.

The procedural prerequisite for judicial review of such an administrative agency determination is illustrated by a New York case in which a teachers' association filed improper practice charges against a school district.[78] The association claimed that a four-month filing limitation, applicable to the filing of improper claims, began when the association sent letters to the district requesting negotiations on the matter. The court found that the four-month limitation began on the date the district notified the association of the action it had taken. The court noted that any other interpretation would allow the prosecution of stale claims, a result that the four-month filing period was specifically designed to avoid. Similarly, in an Illinois case where the school board sought to vacate an arbitration award, the appellate court held that arbitration awards in public education were not judicially reviewable under the

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[76] Board of Educ. v. Montgomery County Educ. Ass'n, 505 A.2d 905 (Md. Ct. Spec. App. 1986).

[77] Pennsylvania Labor Relations Bd. v. Northwestern Educ. Intermediate Unit No. 19, 505 A.2d 1068 (Pa. Commw. Ct. 1986).

[78] Hauppauge Teachers Ass'n v. New York State Employment Relations Bd., 497 N.Y.S.2d 198 (App. Div. 1986).

Illinois Uniform Arbitration Act except in a proceeding to review a determination by the state Educational Labor Relations Board as to whether an employer's failure to comply with an arbitration award is an unfair labor practice.[79] And, the court added, such ELRB determinations are entitled to judicial deference. As a final and different example, in a Massachusetts case a teacher challenged the amount of his agency fee.[80] After the state's Labor Relations Commission dismissed his complaint, he appealed. The Commission, however, refused to assemble and forward the record to the appeals court, taking the position that a dismissal of charges was not a final order under the Massachusetts statute and therefore not subject to judicial review. The appellate court disagreed, holding that any decision by the Commission, including a prehearing dismissal, that effectively determines the outcome of a constitutionally based challenge of an employee's agency fee was a "final order" subject to judicial review.

Propriety of Awards. Again in 1986, the vast majority of courts upheld arbitrators' awards. The courts' review of arbitration awards generally followed the traditional and deferential "essence test." That test requires the court to uphold the arbitrator's decision if the interpretation in any rational way can be viewed to be derived from the essence of the collective bargaining agreement. The overriding judicial policy is one of deference to, and a presumption in favor of, labor arbitration awards. In addition to the cases summarized under the preceding and overlapping the Standard of Review section, several other court decisions were rendered dealing with the propriety of arbitrator and administrative agency awards.

In Pennsylvania, the appellate court upheld an arbitrator's award that determined that teachers with more than ten years of employment who were furloughed by the school district were still entitled to the sabbatical leave rights provided in their collective bargaining agreement.[81] The court also agreed with the arbitrator's decision that the school district was not entitled to a set off for the earnings the teachers made as substitute teachers while on furlough; inasmuch as the teachers had been refused sabbaticals and the one-half salary to which they were entitled, the court did not consider mitigation to be appropriate here.

Similarly, an appellate court in New York upheld an award in which the arbitrator determined that the collective bargaining agreement between a teachers' association and the school district had been violated when the school calendar was changed to require students to attend a full rather than half day on the first day of school.[82] The agreement had required that the calendar be the same form and structure as the previous year, when only a half day was required. The court also upheld the arbitrator's remedy, compensation for the extra work performed, rejecting the argument that it was an impermissible gift of public money.

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[79] Chicago Bd. of Educ. v. Chicago Teachers Union, 491 N.E.2d 1259 (Ill. App. Ct. 1986).

[80] Lyons v. Labor Relations Comm'n, 492 N.E.2d 343 (Mass. 1986).

[81] School Dist. v. Duquesne Educ. Ass'n, 512 A.2d 103 (Pa. Commw. Ct. 1986).

In both Ohio and Pennsylvania, appellate courts upheld arbitrators' decisions which had ordered school districts to grant employees' requests for transfer.[83] In each case, the court found that the arbitrator's award was drawn from the essence of the collective bargaining contract, which provided that preference in filling a vacancy would be given to the employee with the greatest seniority when qualifications of two or more employees requesting transfer were equal.

In each of two other Pennsylvania cases, the appellate court upheld arbitrators' awards in the context of higher education. In one case the court upheld, under the essence test, the arbitrator's determination that the college was required to afford faculty members the opportunity to teach courses before utilizing part-time or special employees.[84] The court's enforcement in this case, however, was only partial; the court vacated the arbitrator's award of damages, finding that no financial loss had been sustained. In the other case, an arbitrator had awarded retirement benefits, based on a collective bargaining agreement between the college and the union that provided for computing a retirement allowance on the basis of accumulated sick leave.[85] The city, which administered the assets of the college, challenged the payment of the sick leave to retiring workers, alleging that it violated the statute applicable to municipal employees. Finding that the city's administration of the college's assets did not render the college employees city employees, the court upheld the arbitrator's award.

Similarly, an appellate court in Washington upheld an arbitrator's award of compensation to teachers who were denied a preparation period as provided in the collective bargaining agreement, despite the fact that the teachers did not specifically request money damages in their grievance.[86]

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[82] East Ramapo Cent. School Dist. v. East Ramapo Teachers' Ass'n, 497 N.Y.S.2d 484 (App. Div. 1986).

[83] Mahoning County Bd. of Mental Retardation & Dev. Disabilities v. Mohoning County T.M.R. Educ. Ass'n, 488 N.E.2d 872 (Ohio 1986); AFSCME Dist. Council 84, Local 297 v. Board of Pub. Educ., 503 A.2d 1044 (Pa. Commw. Ct. 1986).

[84] Community College of Beaver County v. Community College of Beaver County Society of the Faculty, 513 A.2d 1125 (Pa. Commw. Ct. 1986).

[85] Philadelphia v. Local 473 Int'l Bhd. of Firemen & Oilers, 508 A.2d 630 (Pa. Commw. Ct. 1986).

As a final example, Massachusett's highest court upheld an arbitrator's award that reinstated a teacher with back pay after the school board had suspended him for striking a student in violation of the statutory prohibition of corporal punishment.[87] Interpreting the statute to only prohibit intentional conduct and deferring to the arbitrator's finding that the teacher's act was unintentional, the state supreme court reversed a lower court's vacating order.

In keeping with the prior trend, only rarely in 1986 did courts reverse or vacate an arbitrator's award. In one of those rare reversals, a trial court in Massachusetts vacated an arbitrator's award that had granted a public school custodian vacation and longevity pay while he was disabled. The appellate court affirmed the trial court's ruling, holding that the custodian, who was receiving workers' compensation benefits for total incapacity, was entitled to be paid for vacation earned but not taken in the year in which he became totally disabled.[88] He was entitled to receive neither vacation pay for the years in which he did not work at all nor longevity pay for a portion of one of those subsequent years. The court found that such payments to the custodian were plainly forbidden under state statute and that the arbitrator's award was properly vacated as having been made in excess of his powers. Similarly, Michigan's highest court overturned an arbitral award, holding that the arbitrator had exceeded his authority in requiring the school district to offer a physical education position to the next available teacher without regard to the sex of the teacher.[89] Finding that the arbitrator's decision implicitly would have required the school district to hire additional female aides to supervise the girls' locker room, the court pointed out that the collective bargaining agreement explicitly provided that arbitrators shall have no power to increase or change any staffing requirement. As illustrated by these two cases, courts will typically only overturn arbitral awards that clearly contravene express requirements of either external law or contractual language.

Courts also continued to demonstrate deference to the decisions of state labor relations agencies. For example, a Florida court upheld a PERC ruling that a school board had committed an unfair labor practice by its unilateral alteration of the employees' workday and planning time.[90] With due deference to the administrative agency, the court held that absent a clear and unmistakable waiver by the bargaining representative, exigent circumstances, or legislative action imposed as a result of an impasse, the employer's unilateral actions constituted a *per se* violation of the state's unfair labor practices provision.

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[86] Endicott Educ. Ass'n v. Endicott School Dist. No. 308, 717 P.2d 763 (Wash. Ct. App. 1986).

[87] School Comm. v. Waltham Educ. Ass'n, 500 N.E.2d 1312 (Mass. 1986).

[88] School Comm. v. Medford Pub. School Custodians Ass'n, 487 N.E.2d 540 (Mass. App. Ct. 1986).

[89] Port Huron Area School Dist. v. Port Huron Educ. Ass'n, 393 N.W.2d 811 (Mich. 1986).

As one of the less frequent examples on the opposite side, the Montana Supreme Court upheld the reversal of a state personnel board's ruling that a school district had committed an unfair labor practice.[91] The court found that the school district's payment to nonstriking teachers for eighteen days of work where the teachers had agreed to work the full eighteen days, but actually were only required to work one day, was not justified as a legitimate and substantial business decision. As another such example, an appellate court in Oregon reversed an employment relations board's decision to dismiss unfair labor practice charges brought against the school district by two discharged school secretaries, who alleged that the principal's notes in his "problem" file were personnel files that they were entitled to review.[92] The principal had begun this problem file on the two secretaries after rumors, which he attributed to them, circulated that he was having an extramarital affair with another secretary. The collective bargaining agreement contained the following language: "Personnel records shall not contain any information of a critical nature that does not bear the employee's signature or initials, indicating that the employee has been shown the material . . . . The District agrees that it is an employee's right under the law to inspect his or her personnel file."[93] Overruling the employment relations board's dismissal of the unfair labor practice charge, the appellate court held that the principal's files constituted employment evaluations of the employees and, as such, were "personnel files" under the collective bargaining agreement; therefore, the school district committed an unfair labor practice by keeping such critical records on employees without giving the employees a chance to see and explain critical information contained therein.

Interpretation of Collective Bargaining Legislation. In Kansas a teachers' association sent a notice to the school district requesting negotiations "on each and every article in the contract now in effect." The state's Professional Negotiations Act required the parties to enter into negotiations at the request of either party at any time prior to the issuance of new contracts. In addition, it required that written notice of the intent to negotiate on new items or to amend an existing contract be given to the opposite party "in reasonable and understandable detail." The court found that the association's above cited request fell short of indicating to the school district in the required detail the purpose of any contemplated new or amendable items.[94] The court concluded that since the notice provision in the statute appeared to be mandatory, and the school board was never served with sufficient notice, the board was under no duty to enter into professional negotiations with the association.

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[90] Florida School for the Deaf & Blind v. Florida School for the Deaf & Blind Teachers United, 483 So. 2d 58 (Fla. Ct. App. 1986). For another such case, see *supra* note 77 and accompanying text.

[91] Missoula County High School Dist. v. Board of Personnel Appeals, 727 P.2d 1327 (Mont. 1986).

[92] Oregon School Employees Ass'n v. Lake County School Dist., 726 P.2d 955 (Or. Ct. App. 1986).

[93] *Id.* at 957.

Interrelationship with Others Laws. Occasionally cases arising within the context of collective bargaining laws also involve statutes concerning other matters.

Several Minnesota cases concern the relationship between contracts negotiated under the state's collective bargaining statute and cases arising under that state's reduction-in-force statute. In the first of these cases, a group of teachers appealed a school district's decision to place them on unrequested leave because of financial limitations, decreasing enrollments, and discontinued positions. The appellate court found that there was substantial evidence supporting the decisions to place the teachers on unrequested leave in all but one instance, in which the decision to discontinue the position of one instructor in a dental lab was determined to be arbitrary and capricious.[95] In each instance, the court found no violation of the seniority provision in the collective bargaining agreement. In the second case, the same appellate court held that a school board did not violate the collective bargaining agreement when it placed four teachers on unrequested leave of absence.[96] The decision was held to be proper because each of the teachers had either failed to acquire proper licensure and qualifications, failed to prove licensure at the required time, or were not licensed on the date they were originally hired by the school district. In the third case, the same court found that the state RIF statute and the seniority provision of the collective bargaining agreement conflicted and that in cases of confict the statute controlled.[97] Inasmuch as the school district had placed the teacher plaintiffs on requested leave in accordance with the controlling state statute, its decision was upheld. In the fourth Minnesota RIF case, the same appellate court upheld a school board's decision to reassign an administrator to a teaching position, thereby "bumping" teachers.[98] The court held that the "bumping" of a less senior classroom teacher was proper, despite the administrator's lack of actual classroom teaching experience in the district because the decision was based on licensure and date of hire. Finding that both the teachers' and administrators' collective bargaining agreements were silent with regard to seniority, the court determined seniority status based on the controlling RIF statute.

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[94] Unified School Dist. No. 252 v. South Lyon County Teachers' Ass'n, 720 P.2d 1119 (Kan. Ct. App. 1986).

[95] Bye v. Special Intermediate School Dist., 379 N.W.2d 653 (Minn. Ct. App. 1986).

[96] *In re* Meyer, 381 N.W.2d 476 (Minn. Ct. App. 1986).

[97] Urdahl v. Independent School Dist. No. 181, 396 N.W.2d 244 (Minn. Ct. App. 1986).

In a Kansas case, an appellate court found a conflict between the collective bargaining agreement and the state's collective bargaining statute.[99] The school district sought a determination that a tenured teacher's refusal to accept an extra duty basketball coaching position amounted to insubordination and was a breach of contract. The collective bargaining agreement contained a provision that the district could assign duties when they could not be filled voluntarily. The contract also permitted the school district to unilaterally terminate or nonrenew a contract if a teacher refused to accept supplemental duties. The appellate court entered a declaratory judgment in favor of the teachers, holding that the collective bargaining provisions relied upon by the school board were void and unenforceable because they conflicted with the state statutory scheme regarding teachers' collective contracts.

A similar holding was reached in an Indiana case based on the conflict between the collective bargaining agreement and the state's teacher tenure statute.[100] A nontenured teacher appealed his determination. The court held that the collective bargaining agreement's provision for a fair hearing opportunity for nontenured teachers was in violation of the state's teacher tenure act and therefore was void.

Likewise, in an Illinois case, the appellate court upheld the board of trustees of a community college in ruling that the statute governing the dismissal of nontenured faculty members did not apply retroactively.[101] Inasmuch as matters relating to tenure and dismissal had been within the complete discretion of the employer before the statute, they were not subject to modification by a collective bargaining agreement.

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[98] Evans v. Independent School Dist. No. 281, 396 N.W.2d 616 (Minn. Ct. App. 1986).

[99] Unified School Dist. No. 241 v. Swanson, 717 P.2d 528 (Kan. Ct. App. 1986).

[100] Thombleson v. Board of School Trustees, 492 N.E.2d 327 (Ind. Ct. App. 1986).

[101] Williams v. Weaver, 495 N.E.2d 1147 (Ill. App. Ct. 1986).

IMPASSE AND DISPUTE RESOLUTION

Rights on Expiration of Contracts

There were three separate cases in 1986 which dealt with the effect of a collective bargaining agreement after its expiration date. In one case in Massachusetts, the court affirmed an arbitration decision, holding that the school committee, which had participated in an arbitration hearing without raising any claim before the arbitrator that the collective bargaining agreement had expired, could not raise a claim of lack of jurisdiction on appeal.[102]

In another Massachusetts case, the appellate court reached the same result based on a different route.[103] A controversy did not occur until the teacher was terminated, which was after the expiration of the collective bargaining agreement. The court held that since the incident for which the teacher was disciplined took place while the contract was in effect, the dispute over the termination arose under the agreement and the teacher was entitled to arbitration pursuant to the terms of the agreement.

Similarly, in a New York case a community college association brought a proceeding for review of a PERB determination regarding salary increments. The appellate court concluded that the argument regarding the employer's refusal to pay salary increments to faculty members pursuant to an expired collective bargaining contract was actually moot, because a subsequent collective bargaining agreement, which was retroactive to the expiration date of the previous contract, did not provide for step advancements during the first year of a successor agreement.[104]

CONCERTED ACTIVITY

Strikes and Other Job Actions

Teachers in a Pennsylvania school district were awarded unemployment compensation benefits during the period of a work stoppage, and the school board appealed. The Supreme Court of Pennsylvania considered the question of whether this work stoppage was a strike or a lockout.[105] The stoppage occurred when the school board replaced one insurance carrier with another. The collective bargaining contract provided that such a substitution was allowable provided that insurance benefits were equivalent. The PLRB determined that the two health plans were not equivalent, and the court upheld that conclusion. Accordingly, since the subsequent cessation of work resulted from the school district's failure to provide health coverage pursuant to the terms of the contract, the court characterized the work stoppage as a lockout rather than a strike. The school district's offer to restore the original health plan, only upon the precondition that the teachers cease their work stoppage and return to work, did not convert the lockout into a strike for unemployment compensation eligibility purposes. Thus, the court held that the teachers' awards of unemployment benefits during the work stoppage were proper.

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[102] School Comm. v. Revere Teachers' Ass'n, 492 N.E.2d 748 (Mass. App. Ct. 1986).

[103] Old Rochester Reg. Teachers' Club v. Old Rochester School Dist. Comm., 500 N.E.2d 1315 (Mass. 1986).

[104] Faculty Ass'n v. Public Employment Relations Bd., 508 N.Y.S.2d 591 (App. Div. 1986).

[105] Norwin School Dist. v. Belan, 507 A.2d 373 (Pa. 1986).

In another case a Pennsylvania school district brought an action seeking an injunction against a teachers' strike. Although the case was moot by the time it reached the appellate court, the court decided its merits because it involved an important and recurring public issue which would otherwise repeatedly escape judicial review.[106] The court upheld the injunction against the teachers, ruling that the strike by public school teachers created a clear and present danger to the public through the possibility of decreased state funding to the school district if it failed to provide the yearly requirement of 180 days of instruction.

In an Illinois case, faculty members at a community college engaged in an illegal strike. The issue in litigation was whether the college acted properly in including a one-day holiday during the strike period as one of the days for which the faculty members would not be paid. The appellate court ruled in favor of the faculty, holding that they were under no duty to provide services to the college on a legal holiday and that their salaries were improperly "docked" for that one day.[107]

In Louisiana a school district implemented a reduction-in-force three and one half months after the employees had engaged in a legal strike. The plaintiffs alleged that the board violated the terms of the previously negotiated contract in conducting the reduction-in-force, in that it used a "super seniority" list which constituted direct reprisal against those employees who participated in the strike. The state appellate court held that an agreement made by the school board with the new employees could not be considered in determining the rights of the former strikers with the board; only the contract between the board and the strikers could be considered.[108] Also, a letter authorized by the superintendent during the strike advising that all employees who did not return to work by a specified date would be presumed to have abandoned their position, was determined to be without effect on the subsequent contract approved by the board and the employees, where the letter was not made a part of that later contract. The court ordered that the teachers be reinstated with full seniority and be placed in the same economic position that they would have enjoyed had they not been dismissed.

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[106] Jersey Shore Educ. Ass'n v. Jersey Shore Area School Dist., 512 N.E.2d 805 (Pa. Commw. Ct. 1986).

[107] Allen v. Board of Trustees, 492 N.E.2d 1168 (Ill. App. Ct. 1986).

[108] St. John the Baptist Ass'n of Educators v. Brown, 494 So. 2d 553 (La. Ct. App. 1986).

During a teachers' strike in Rhode Island a trial court issued a preliminary injunction against the continued strike and subsequently adjudicated fifty-three teachers and the union to be in civil contempt. The Rhode Island Supreme Court denied the appeals by the teachers and the union, and the case was remanded for further proceedings.[109] The court found that the posting of copies of the contempt citations on the doors of the homes of the teachers was sufficient notice and that the union waived any lack of notice claim when its counsel announced in court that it was ready to proceed. The union had also claimed that there was insufficient evidence to prove that it was in contempt in that the officers did not even confer with one another or with any of the membership after the injunction had been issued. The court rejected that argument, finding that there was competent circumstantial evidence for the civil contempt charge in that the union officers refused to comply with the injunction and through its officers actions it had signaled its membership to continue with the policy of no contract, no work.

In the final strike-related case, a New York appellate court hearing the case held that: (1) according to state statute the determination that the teachers had participated in a prohibited strike became final twenty days after the teacher received notice of the determination and made no objections; (2) the determinations were not invalid on the ground that they were prepared by the assistant superintendent, rather than the superintendent; and (3) the method of computing the financial penalty against the teachers was consonant with the statute governing such penalties.[110]

MISCELLANEOUS DECISIONS

In West Virginia, service personnel filed a class action grievance against a board of education, seeking back pay from special levies passed by the voters of the school district. During the pendency of the grievance settlement negotiations, a separate class action suit was brought against the board on behalf of claimants who chose not to accept the proposed settlements. The trial court entered a judgment order, approving the proposed settlements, giving those claimants substantially more money than was received by the litigants who accepted the proposed settlements. When the board moved to set aside the judgment in the separate action, the trial court set aside the orders in both actions. The school board and the representatives of the original class action petitioned the state supreme court, which held that: (1) the claimants who opted out of the original class and brought a separate class action lacked standing to challenge the settlement approved in the original class action; and (2) the trial court's setting aside of the settlement, on the grounds that the school board was behaving reprehensibly by contesting the order in the separate class action while settling with the original class, was an abuse of judicial discretion.[111] Accordingly, the supreme court issued the writ of prohibition, prohibiting the trial court from setting aside its original order.

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[109] School Comm. v. Pawtucket Teachers' Alliance, 510 A.2d 943 (R.I. 1986).

[110] Barner v. Jeffersonville-Youngsville Cent. School Dist., 502 N.Y.S.2d 285 (App. Div. 1986).

In an Ohio decision, the state's supreme court ruled that an arbitrator's award did not, in the circumstances of the case, preclude a nonrenewed teacher's mandamus action.[112] Similarly, in a Seventh Circuit decision, the court held that a prior arbitrator's decision, pursuant to a collective bargaining decision, did not have a preclusive effect in a subsequent title VII suit.[113]

In a peripherally related case, relevant only because it arose in the context of a teacher's association, the executive director of the association brought an action against its retirement plan. The question presented to the court concerned the retirement benefits to which the plaintiff was entitled. The federal district court held that: (1) the executive director was an eligible nonunit member in the employment of the association on the eligibility date of the retirement plan so as to be entitled to a lump-sum cash payment option under the early retirement incentive plan; and (2) under the deferred compensation agreement he was entitled to either the cash surrender value or the actual ownership of term insurance policies maintained by the association on the date he terminated his employment, but the association was not required to continue to pay the policy premiums.[114]

Finally, in a New York case the contract of a custodian was terminated for allegedly falsifying her time records. According to the collective bargaining agreement procedure she was entitled to a

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[111] Board of Educ. v. Starcher, 343 S.E.2d 673 (W. Va. 1986).

[112] State *ex rel.* Francu v. Windham Exempted Village School Dist. Bd. of Educ., 496 N.E.2d 902 (Ohio 1986).

[113] Johnson v. University of Wis.-Milwaukee, 783 F.2d 59 (7th Cir. 1986).

[114] Hebert v. Massachusetts Teachers Ass'n Retirement Plan, 627 F. Supp. 535 (D. Mass. 1986).

"meaningful hearing" on the matter. The school board failed to produce her supervisor at the hearing, and instead presented the supervisor's testimony by way of a predated, signed statement. The employee was given no opportunity to respond to the statement. The appellate court determined that such conduct denied the employee of a "meaningful hearing," and the case was remanded for a new hearing.[115]

CONCLUSION

The year 1986 gave us many cases in the area of collective bargaining in education. It seems reasonable to expect that this increase in litigation in this area will continue. The number and variety of cases decided by the courts in 1986 was larger than in recent previous years, and there is no reason to suspect that in the future there will be any reduction in the propensity of either labor or management to litigate collective bargaining issues.

No new legal principles were established in the 1986 collective bargaining cases in education and no startling legal precedents were handed down. The courts continued to uphold arbitrators' awards and, to a lesser extent, employment board decisions.

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[115] Verbeeck v. Board of Educ., Shoreham-Wading River Cent. School Dist., 500 N.Y.S.2d 293 (App. Div. 1986).

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PUPILS

Henry S. Lufler, Jr.

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INTRODUCTION

Attempts by school districts to control the use and sale of drugs by students have led to a sharp increase in cases reported in two sections of this chapter. Search and seizure issues are sometimes raised when school disciplinary proceedings or criminal charges are filed against students found with drugs. Courts continue to apply the standard of reasonable suspicion in school drug searches, and most such searches were upheld in 1986. Several state courts, however, addressed the question of whether searches that might pass federal constitutional muster could be challenged under state search standards.

Drug-related cases also are found in the section on suspensions and expulsions. As a means of dealing with increased drug use by students, some schools have adopted automatic expulsion penalties for the use or sale of controlled substances. These measures were attacked on both procedural and substantive due process grounds in a number of 1986 cases. While the penalties generally were upheld, courts questioned the power of school officials to regulate student conduct off school premises. Several out-of-school drug cases resulted from testimony provided by undercover informants, whose role also led to challenges in several cases.

First amendment religion and expression also continued to be areas of high activity. Home instruction remained a source of court challenges, advanced on religious and other constitutional grounds. The debate also continued in the courts regarding the use of school facilities by student religious groups during activity periods. The greatest number of free expression cases, however, continue to argue questions of school access raised by organizations seeking to convey social or political messages.

Finally, desegregation cases still occupy the attention of federal courts, with a dozen such cases heard in 1986 by circuit courts of appeal. The standards to be used by district courts in reviewing desegregation in districts previously declared unitary were debated by two appeals courts, which issued conflicting opinions. The United States Supreme Court, however, refused to hear either case.

PUBLIC SCHOOL ASSIGNMENT, TUITION, AND TRANSPORTATION

Tuition and Assignment

Pupil tuition and assignment cases sometimes involve constitutional issues, such as the obligation of states to provide education to undocumented aliens or the creation of an irrebuttable presumption of nonresidence in a residency law. Major issues were lacking in 1986 cases, however, as more traditional disputes involving guardianship or domicile for educational purposes predominated.

A West Virginia student challenged the decision of a high school principal that prohibited him from enrolling in the district. Because of family problems, the student had left his parents' home and was staying with relatives who resided in a different school district. He was denied admittance to the local high school because he lacked innoculation and academic records and because the relatives with whom he was staying were not his legal guardians. The supreme court of appeals, however, concluded that the principal should have provisionally admitted the student pending a resolution of the guardianship question.[1] The court found that West Virginia law contained the presumption that the public schools should be open to all persons of proper age. While guardianship questions were important, the statute did not require the child to remain in the previous district while they were resolved.

In another West Virginia decision, the state's high court ruled that a school district had acted arbitrarily and capriciously in refusing to admit a child into kindergarten whose birthday fell three days after the deadline for acceptance.[2] The court found that the school board had failed to exercise the discretion provided for under the relevant state statute for a child under the age of five shown to be "capable of kindergarten work." A dissenting justice argued that the failure to use a fixed date would produce a group of kindergarten graduates unable to enter first grade, because the statute sets an absolute date for that program.

Two New York school districts squabbled over whose duty it was to educate the children of a woman living in a temporary shelter for the homeless. Neither the district where the woman previously resided nor the district where the shelter was located would accept the children. A New York appeals court resolved the question by ordering the district with the shelter to provide the education, holding that a school district cannot deny enrollment to children living within the district even if their residence may only be for a foreseeable short term.[3]

A state of Washington statute permits students with a "special hardship" to be enrolled in districts other than the one in which they reside, under provisions including an administrative appeals system. Those who lose administrative decisions frequently provide litigation to be reported in this chapter. In a 1986 case, the Washington Supreme Court overturned a lower court decision granting a hardship transfer to parents who claimed "adverse safety and education conditions" in their home school district.[4] Neither this claim, nor the mother's suggestion that the stress caused by the situation had led her to suffer a digestive disorder, were sufficient to cause the court to find that the administrative denial of the transfer was so clearly erroneous that it required judicial reversal.

A New York appeals court upheld a lower court decision requiring parents to pay tuition for their children.[5] Both courts found that the parents had failed to offer any evidence that their official residence was a city apartment and not a farm that postal and tax records indicated was their residence of record.

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[1] White v. Linkinoggor, 344 S.E.2d 633 (W. Va. 1986).
[2] Blessing v. Mason County Bd. of Educ., 341 S.E.2d 407 (W. Va. 1985).
[3] Delgado v. Freeport Pub. School Dist., 499 N.Y.S.2d 606 (Sup. Ct. 1986).
[4] Frazier v. Superintendent of Pub. Instruction, 725 P.2d 619 (Wash. 1986).
[5] Oneota City School Dist. v. Manning, 501 N.Y.S.2d 231 (App. Div. 1986).

In a North Dakota case, a local school district challenged an order by the county committee that it pay the tuition of children wishing to attend a public school in a different district. The school district based its claims on technical grounds, arguing that the county committee had failed to meet statutory requirements by allowing more than fifteen days to elapse between the date of the appeal and its decision. The state supreme court rejected their claim, concluding that the time limit in question was designed to assure "order and promptness" in the proceedings and that the "legislature did not intend that noncompliance would preclude action on applications filed under the statute."[6]

Transportation

A Pennsylvania school district and the state each sought a declaratory judgment on whether a district was obligated to provide midday transportation to gifted, nonpublic school students. The court found that a state statute requiring that gifted students in private schools be provided with an opportunity for "dual enrollment" in special public school programs contained an implicit obligation that they be transported.[7] It then ruled that public school districts were obliged to provide either free transportation or board and lodging to such students.

Each year this section reports at least one West Virginia rural road case and 1987 is no exception. The West Virginia Supreme Court of Appeals previously has held that the state constitution makes education a fundamental, constitutional right and that West Virginia children must be provided with transportation in order to exercise that right.[8] Parents of a child living on a two-mile dirt road brought suit against their school district and the state highway department, asking for transportation and improvement of the road so that the service could be provided. They subsequently appealed a lower court decision that failed to order the road repairs.

Testimony in the case revealed that the plaintiff's children and thirteen other elementary students faced numerous obstacles walking to school down Sand Creek Hollow Road, including several river crossings. After leaving the hollow, their walk to school then included a river crossing on an abandoned, swinging pedestrian bridge and a trip across railroad tracks containing moving or parked coal trains. After this review, the court concluded that the highway department had an obligation to fix the road sufficiently to allow a bus or a smaller school transport vehicle to provide transportation to the children.[9]

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[6] Stolen Pub. School Dist. v. Heisler, 381 N.W.2d 201, 204 (N.D. 1986).

[7] Woodland Hills School Dist. v. Pennsylvania Dep't of Educ., 516 A.2d 875 (Pa. Commw. Ct. 1986).

[8] *See* Pauley v. Kelly, 255 S.E.2d 859 (W. Va. 1979); Shrewsbury v. Board of Educ., 265 S.E.2d 767 (W. Va. 1980).

Compulsory Attendance

The popularity of home education, particularly among members of religious sects, continued to lead to conflicts with compulsory school attendance laws in 1986. Disputes frequently arise when parents or unaccredited small private schools fail to comply with state regulations regarding teacher certification or curriculum approval processes. Legal action often is initiated by local school officials who question a student's whereabouts during school hours or who suspect that the education being received by a child in a home school program is inadequate. While state home instruction statutes vary widely, courts have upheld state regulations so long as they do not involve subjective, case-by-case evaluations of home programs.

In a North Dakota case, several parents convicted of violating compulsory school attendance laws challenged that state's requirement that all students be taught by certified teachers, on the ground that their freedom of religion was being violated.[10] The parents in question were fundamentalist Christians who had chosen to educate their children at home in the belief "that God had given them sole responsibility to educate their children."[11] The North Dakota Supreme Court conceded that the compulsory school attendance statutes did impose some burden on the plaintiffs' free exercise right. Nevertheless, the court refused to overturn the conviction on the grounds that the certification requirement was one of the least intrusive means of ensuring that the state's children received an adequate education.

In a complicated case also reported here last year, the parents of children enrolled in a home school program sought declaratory, injunctive, and monetary relief against officials involved in the enforcement of Indiana's compulsory school attendance law. In deciding the issue, the Seventh Circuit Court of Appeals denied the plaintiffs' request and refused to decide the constitutional issues they raised on the grounds that such claims were moot.[12] The parents themselves had enrolled their children in an Illinois school. Despite the parents' claim that they had placed them there out of fear of future prosecution for truancy violations, the court held that the move "fatally weakened" the parents' standing to challenge Indiana attendance law.

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[9] Collins v. Ritchie, 351 S.E.2d 416 (W. Va. 1986).

[10] State v. Patzer, 382 N.W.2d 631 (N.D. 1986). In a case presenting the same facts, an equally divided Michigan Supreme Court upheld a state teacher certification requirement against parochial schools on the grounds that its infringement on free exercise rights was "minimal." *See* Sheridan Road Baptist Church v. Department of Educ., 396 N.W.2d 373 (Mich. 1986).

[11] 382 N.W.2d 631, 633 (1986).

[12] Mazanec v. North Judson-San Pierre School Corp., 798 F.2d 230 (7th Cir. 1986). *See* The Yearbook of School Law 1986 at 79.

The parents also sought monetary damages on the grounds that the local superintendent of schools had initiated legal action against them out of hostility to home schooling and their beliefs as Jehovah's Witnesses. The appeals court also rejected those claims, finding that it was their own refusal to verify their compliance with state statutes, and not any misconduct by the superintendent, that had caused legal action to be taken against them. A request for an award of attorneys' fees was denied on the ground that they "never prevailed in getting any declaration that their civil rights claims had merit."[13]

The correct proceedings to use in addressing home instruction cases were argued before the North Dakota Supreme Court. The parents of several children had withdrawn them from the public schools and were educating them at home. The state then sought to have the children declared "unruly." The court ruled that "a child may not be found to be unruly because of habitual truancy if the child is absent from school in compliance with the directives of the parents."[14] The correct course of action, then, was to proceed against the parents for violating compulsory attendance laws.

New York statutes place a burden on parents to show that home instruction is "substantially equivalent" to that provided to children of like age and attainments in local public schools. Legal action was initiated against a Delaware County family because of their refusal to cooperate with attempts by officials to ascertain the quality of education being furnished to their children. A local family court had ruled in the parents' favor on the grounds that the burden of proof was on the state to prove educational neglect. An appeals court overturned this decision, finding that the parents' refusal to cooperate permitted an inference of neglect on their part.[15]

A Virginia appellate court considered the appeal of parents whose children were denied a religious exemption from compulsory school attendance by a local school board.[16] A lower court had ruled that the board did not abuse its discretion in the denial. The appeals court decided to dismiss the case on technical grounds, concluding that it did not have the jurisdiction to conduct a review of an administrative decision unless made by a state agency, thus leaving school board decisions of this sort outside its purview.

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[13] *Id.* at 237.

[14] *In re* C.S., 382 N.W.2d 381 (N.D. 1986).

[15] *In re* Andrew TT, 504 N.Y.S.2d 326 (App. Div. 1986).

[16] Schwartz v. Highland County School Bd., 346 S.E.2d 544 (Va. Ct. App. 1986).

In a case that did not involve home instruction, a Minnesota appeals court overturned a lower court decision finding three children guilty of habitual truancy.[17] The students challenged the admission of school attendance records as evidence in the case, making the novel argument that the use of the records would violate their right to confront and cross-examine witnesses. In order to prove the charges of habitual truancy against the students, it had to be shown that "they [had] absented themselves from school without lawful excuse."[18] The court concluded that school attendance records were inadmissible as evidence against the students because they did not just reflect nonattendance, but also contained judgments as to whether the students' absences were excused. The court held that the admission of such "evaluative" reports would violate the students' right to challenge the evidence used against them. This decision was appealed.

On appeal, the Supreme Court of Minnesota found that the evidence against two of the students was sufficient to prove habitual truancy, but was not enough for a third.[19] The court ruled that school attendance records were admissible to show the absence of a student on a particular day, the excuse that was offered by the parent, and the fact that no explanation for the absence was received from a parent or guardian. Looking at the details of the absences, the court found that the burden of proof was on the parent to provide lawful excuses for absences and, after examining the challenged attendance records, found sufficient evidence that such excuses were not present for two of the children.

A justice of the Supreme Court of South Carolina overturned the decision of a local family court judging a minor to be delinquent because she had twenty-one unexcused absences from school.[20] The court concluded that the days the student had been suspended from school should not have been counted and that there could be no finding of delinquency without evidence that her absences had occurred without the knowledge of her mother.

In another South Carolina case, a justice heard the appeal of a minor who also had been found guilty of violating that state's compulsory attendance laws.[21] The court ruled that the issues raised in the case were moot because the student had reached an age that the act in question did not cover and because the court order against him had expired without causing him any continuing disability.

A juvenile who was detained by police officers for being truant and who was subsequently arrested for assaulting a policewoman appealed a family court decision.[22] The student claimed that the enforcement power of the compulsory education laws was exclusively conferred on school officials. The appellate court rejected this claim, concluding that the officer who detained the appellant had the authority to do so even though compulsory attendance laws were noncriminal in nature.

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[17] *In re* L.Z., 380 N.W.2d 898 (Minn. Ct. App. 1986).
[18] *Id.* at 903.
[19] *In re* L.Z., 396 N.W.2d 214 (Minn. 1986).
[20] *In re* Angela H., 340 S.E.2d 544 (S.C. 1986).
[21] *Ex parte* Lathan J., 343 S.E.2d 179 (S.C. 1986).

BILINGUAL-BICULTURAL PROGRAMS

Mexican-American plaintiffs in Texas continued their litigation against the Raymondville Independent School District which they accused of discriminating against them in their ability grouping of students, their teacher hiring practices, and their failure to implement an adequate bilingual education program. The Fifth Circuit Court of Appeals decided in 1981 that the district's bilingual education program did not violate title VI of the 1964 Civil Rights Act.[23] The case was remanded, however, so that the district court could examine the plaintiffs' claims in light of possible past racial discrimination by the district.

On remand, the plaintiffs amended their complaint to include the Texas Education Agency, alleging that the state had failed to ensure that the local district had implemented an adequate bilingual program. After a second trial, the district court concluded that no vestiges of past discrimination remained. Therefore, the court held a second time that the district had violated neither title VI nor the Equal Educational Opportunities Act of 1974 and also found that the state had discharged its responsibilities under Texas law.

In its second review of this case, the Fifth Circuit Court employed the standard of whether the lower court's decision was "clearly erroneous" and found that the district court had not abused its discretion in finding for the defendants on all the points at issue.[24] The appeals court began by noting the "wide array" of changes made in the district's bilingual programs. The court then agreed that the existence of a high school in which nearly 98% of the student body was comprised of Mexican-Americans did not necessarily imply purposeful segregation because of the school district's large Hispanic population. The court further held that ability grouping practices of the district were not necessarily discriminatory, since the scores on tests written only in English were "but one factor" used in assigning students to one of three ability groups. The court also found that the district's low percentage of Mexican-American teachers stemmed from undesirable living and working conditions, as well as competition from other school districts. The appeals court concluded by observing that it was not its role to determine whether the district had taken every possible step to improve the education of its Spanish-speaking students.

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[22] *In re* Shannon B., 503 N.Y.S.2d 179 (App. Div. 1986).

[23] Castaneda v. Pickard, 648 F.2d 989 (5th Cir. 1981). *See* The Yearbook of School Law 1982 at 142.

[24] Castaneda v. Pickard, 781 F.2d 456 (5th Cir. 1986).

The Chicago Board of Education was successful in obtaining a protective order from a district court preventing the federal government from taking depositions on the motives behind the board's activities in preparing its federal bilingual grant application.[25] The application is an issue in the ongoing Chicago school desegregation dispute, with questions raised as to whether the bilingual program materially aids the desegregation plan. The court held that the government could seek objective information from the district but that the examination of the board's motives or intent represented a "fishing expedition" that could be conducted only with "hard evidence" of the board's bad faith.

PRIVATE AND PAROCHIAL SCHOOLS

A 1983 Rhode Island parochial school case continued in 1986, with the school district involved in the dispute seeking attorneys' fees from the state commissioner of education. The district did not operate a high school but paid tuition for students to attend several nearby public schools. A parent sought tuition from the district for his son to attend a parochial school and the request was denied. The commissioner subsequently ordered the district to pay the tuition and litigation followed.

The issue was resolved by the Rhode Island Supreme Court where the question of state law interpretation had been certified as part of a federal court lawsuit. The state high court ruled that the commissioner had misinterpreted state law in ordering the school district to provide tuition for students to attend any school of their own choice.[26] The commissioner then appealed an award of attorneys' fees made by the federal district court where the litigation had started to the First Circuit Court of Appeals.[27]

The commissioner claimed that the fees should be denied because the case was decided under state court proceedings over which the district court had no control, claiming *Pennhurst State School and Hospital v. Haldeman*[28] as authority. The First Circuit Court rejected this defense, holding that *Pennhurst* encourages the certification of issues to state courts. The appeals court went on to find that the award was appropriate, even though the federal section 1983 claim was not finally decided by the federal court, thereby rejecting the second of the defendant's claims. Finally, the appeals court rejected an eleventh amendment defense and upheld the lower court order that the fees be paid.

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[25] United States v. Board of Educ. of Chicago, 636 F. Supp. 1050 (N.D. Ill. 1986).

[26] Exeter-West Greenwich Regional School Dist. v. Pontarelli, 460 A.2d 934 (R.I. 1983).

[27] Exeter-West Greenwich Regional School Dist. v. Pontarelli, 788 F.2d 47 (1st Cir. 1986).

[28] 465 U.S. 89 (1984).

SUBSTANTIVE RIGHTS OF STUDENTS

Search and Seizure

Search and seizure cases are reflecting the fact that school personnel are becoming more assertive in seeking to control student drug use and in preventing the sale of drugs in schools. The United States Supreme Court decision in *New Jersey v. T.L.O.*[29] helped clarify some school search issues. In that case, the Court held that searches were justified if there were "reasonable grounds" that the student was violating the law or school rules and that a search would pass muster when the methods adopted were "reasonably related to the objectives of the search and are not excessively intrusive in light of the age and sex of the student and the nature of the infraction."[30] The "reasonableness" balancing test enunciated in *T.L.O.* was at the heart of a number of 1986 search and seizure cases.

A New Jersey appeals court confronted the question of reasonableness in reviewing the requirement of a local school district that over 500 high school students receive an annual urine test to detect the presence of controlled substances.[31] Students with positive tests were referred to counseling and treatment programs. No civil or criminal penalties resulted and the test results were kept confidential. As described by the court, the "linchpin" of the district's argument was that the tests were medical in nature and that, therefore, the law of search and seizure did not apply. The plaintiffs disagreed, referring to the practice as "general searches of student plaintiffs' bodies under the subterfuge of forced medical examination."[32]

The court looked for guidance in other urine-testing cases, finding that tests had been approved when they were related to the demands of a particular occupation and were administered to those in selected positions.[33] In the case at hand, the testing of the students took place without any suspicion at all that specific students had been using drugs. Thus the court found, echoing *T.L.O.*, that the search was "not reasonably related in scope" to the circumstances that justified the search. The court went on to observe that the spectrum of items a school might define as "medical" was "limitless," holding that the school had other less-intrusive methods for dealing with drug use.

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[29] 469 U.S. 325 (1985).

[30] *Id.* at 336.

[31] Odenheim v. Carlstadt-East Rutherford Regional School Dist., 510 A.2d 709 (N.J. Super. Ct. Ch. Div. 1985).

[32] *Id.* at 711.

[33] Shoemaker v. Handel, 608 F. Supp. 1151 (D.N.J. 1985) (testing of jockeys); McDonell v. Hunter, 612 F. Supp. 1122 (S.D. Iowa 1985) (testing of a corrections officer).

A state of Washington appeals court found that a school had more than enough particularized suspicion about a student's involvement with drugs to make a locker search reasonable.[34] A search of the student's locker led to the discovery of a box containing hallucinogenic mushrooms that the student admitted he had been selling in school. After a court conviction, the student sought to have the evidence taken in the search excluded from consideration in his appeal. In considering this fourth amendment claim, the court turned to the issues that led to the search, including an informant's tip, three previous teacher reports of the student's drug use, conferences with the student's parent, and the student's presence in places where drugs were believed to be sold. This was more than enough to convince the court that the search was reasonable. The court also ruled that the Washington Constitution, otherwise more restrictive than the federal fourth amendment, was not more restrictive in the area of school searches.

A Florida student failed to convince a court that the evidence taken in a search of his locker should be suppressed.[35] The student was convicted for taking lunch tickets valued at more than $3,000 from a school office. The search of the sticky-fingered student was found to be reasonable after witnesses had seen him near the office in question and when he was found trying to conceal a jar of honey that also had been taken.

A Pennsylvania court confronted a question of first impression for that state's courts in deciding whether the fruits of a locker search could be used in a delinquency proceeding.[36] The student was seen taking cigarettes from his locker and giving them to another student. A subsequent search of the locker found more cigarettes and marijuana. Despite these parallels with *T.L.O.*, the court reached a different conclusion, holding that the student had a reasonable expectation of privacy in the locker and that the school had no suspicion that the student also was involved in drug use or sales. In a concurring opinion, two of the three justices further explained that the school had never told students that lockers might be searched, creating the expectation that they represented a zone of privacy similar to the student's person.

Strip searches of students frequently result in litigation. A Michigan district court considered requests for summary judgment in a case involving a strip search of a student found behaving suspiciously in a parking lot by a school security guard.[37] A search of the student's purse uncovered school "readmittance slips," but a body search resulted when the principal believed that the student was in possession of drugs. None were found. In looking at the facts, the court found that the principal lacked a reasonable suspicion that drugs would be found. Thus, under *T.L.O.*, the search was not reasonable at its inception, and the case against the principal was allowed to continue.

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[34] State v. Brooks, 718 P.2d 837 (Wash. Ct. App. 1986).

[35] R.D.L. v. State, 499 So. 2d 31 (Fla. Dist. Ct. App. 1986).

[36] *In re* Dumas, 515 A.2d 984 (Pa. Super. Ct. 1986).

First Amendment Religious Rights

The use of school facilities by student-run religious groups during extracurricular activity periods was before the United States Supreme Court in 1986, but the Court sidestepped the constitutional issue. *Widmar v. Vincent*[38] established the principle that universities could not deny student prayer groups equal access to school facilities were that afforded other groups, without violating their free speech rights. The applicability of the decision to the public schools has remained in doubt. In a review of a case raising this issue, the Third Circuit Court of Appeals found that a secondary school prayer group fell outside the *Widmar* holding.[39] The appeals court suggested that secondary students were more impressionable than their university counterparts and might see state sponsorship in the practice. The court held that the public school prayer group activities would lead to the school's "excessive entanglement" with religion, thereby violating the first amendment.

When this case reached the Supreme Court, however, it was decided on a secondary issue. The student group, Petros, filed the original federal court action and won the ruling that their free speech rights had been abridged by the failure of the school district to allow their club to meet.[40] Appeal to the Third Circuit was taken, however, not by the board but by an individual board member, John Youngman, Jr. His standing to pursue the appeal did not become an issue until the case was heard by the Supreme Court. Once the issue was raised, the five-to-four Court majority held that he did not have standing and the appeal was dismissed.[41]

In dissent, the Chief Justice argued that Youngman's standing as a parent of a student in the district gave him the right to appeal and observed that had the appeal been pursued on that basis it would have been before the Court in its same form. As to the issue raised in the Third Circuit, the Chief Justice concluded that the establishment clause was not controlling in the face of equal access claims advanced by the students. The four dissenting justices indicated that they felt *Widmar's* speech and association rights would properly be extended to high school students.

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[37] Cales v. Howell Pub. Schools, 635 F. Supp. 454 (E.D. Mich. 1985).

[38] 454 U.S. 263 (1981).

[39] Bender v. Williamsport Area School Dist., 741 F.2d 538 (3d Cir. 1984). *See* The Yearbook of School Law 1985 at 106-8.

[40] Bender v. Williamsport Area School Dist., 563 F. Supp. 697 (M.D. Pa. 1983).

[41] Bender v. Williamsport Area School Dist., 106 S. Ct. 1326 (1986).

The extent to which schools create a "public forum" by allowing meetings to occur on their premises, opening up claims by religious groups for equal treatment, was argued in other 1986 cases. The Seventh Circuit Court of Appeals considered an appeal of a federal court decision in Indiana that had held that teachers did not have the right to hold prayer meetings in school before the contractual start of their school day.[42] The appeals court concluded that the teachers did not have a right of free access to the school for meetings on topics of their own choosing when the plaintiffs had not demonstrated a similar privilege had been conveyed to the general public.

The issue of before-and-after school prayer was addressed in a challenge to a district's policy of renting school space to a religious council that met in an elementary school. For a nominal fee, the Findley, Ohio, board provided the space so that third and fourth graders could receive religious instruction. Using dicta from two 1985 Supreme Court cases as guidance,[43] the district court concluded that impressionable eight and nine year old children would be unable to distinguish the religious programming from the rest of the school day.[44] In addition, the court found that the timing of the programs caused them to benefit from the state's compulsory attendance law. A summary judgment therefore was entered on behalf of the plaintiffs.

In a case attracting substantial national attention, a district court ruled that students had a limited right to "opt out" of elementary reading classes their parents argued would violate their religious freedom. The case had been returned to the district court by the Sixth Circuit Court of Appeals for a hearing on the question of whether the Holt, Rinehart, and Winston basic reading series infringed on the plaintiff's free exercise right and, if it did, whether the state had a compelling interest in denying the right.[45] The plaintiffs argued that the series as a whole might cause a child to adopt "feminist, humanist, pacifist, anti-Christian, vegetarian or one-world government views." This perspective, they held, was antithetical to their Christian faith. While both parties agreed that the texts offended a set of sincerely held religious views, the case hinged on whether the state's interest was sufficiently great to permit the infringement.

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[42] May v. Evansville-Vanderburgh School Corp., 615 F. Supp. 761 (S.D. Ind. 1985), *aff'd*, 787 F.2d 1105 (7th Cir. 1986).

[43] Wallace v. Jaffree, 469 U.S. 1102 (1985); Grand Rapids School Dist. v. Ball, 469 U.S. 1014 (1985).

[44] Ford v. Manuel, 629 F. Supp. 771 (N.D. Ohio 1985).

[45] Mozert v. Hawkins County Pub. Schools, 582 F. Supp. 201 (E.D. Tenn. 1984), *rev'd*, 765 F.2d 75 (6th Cir. 1985).

The defendants argued in district court that the schools would be overburdened with a flood of other requests if the schools were required to offer parallel reading courses or design individual student programs.[46] The court avoided this argument by fashioning a specific compromise that would allow students to "opt out" of reading by spending time in a study hall. The students would be taught reading by their parents at home and tested by the school to ensure that their reading proficiency was maintained. Specific permission would have to be sought by plaintiff parents for this alternative, and it would be granted only in reading and only to parties in the case. By limiting its holding in these ways, the court found that it could accommodate the religious interests of the plaintiffs against the state's interest. Damage claims against school officials were denied because "they cannot be expected to have anticipated the ruling" and therefore must be accorded good faith immunity. A hearing on damages against the school board was held for jury trial, if there was no settlement.

The Supreme Court ruling in *Aguilar v. Felton*[47] held that programs funded by chapter 1 of the Educational Consolidation and Improvement Act of 1981, directed at children from disadvantaged backgrounds, could not be offered to eligible religious school students in private school classrooms. In order to comply with *Aguilar*, New York school officials developed a program to serve female students attending a Hasidic Jewish school. Under the plan, the students would receive chapter 1 instruction within a public school. To accommodate the tenets of their faith, a portion of the building was separated by a partition from the rest of the school, so that girl students would not come in contact with boys. Instruction would be provided in Yiddish by female public school teachers.

The plan was challenged by the parent association of the predominantly Hispanic elementary school where the instruction was to take place. Among the issues raised were the facts that only bilingual teachers were assigned to the Hasidic program and that English as a second language was offered only in that program. In overturning a district court decision not to issue an injunction against this arrangement, the

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[46] Mozert v. Hawkins County Pub. Schools, 647 F. Supp. 1194 (E.D. Tenn. 1986).
[47] Aguilar v. Felton, 469 U.S. 878 (1985).

Second Circuit Court focused a traditional establishment law analysis.[48] Using the test found in *Lemon v. Kurtzman*,[49] the appeals court looked at whether the primary effect of the program advanced religion. The court concluded that the plan had that effect by making unique efforts to accommodate the sect's special needs, having a "magnified negative impact" on the public school students observing the program. Having decided the case on "primary effect" grounds, the appeals court observed that the district also might wish to examine the program under the "excessive entanglement" test in *Lemon* when considering whether to issue a permanent injunction.

Invocations at the start of high school commencements or other school ceremonies have led to first amendment challenges, with courts divided on whether the practice is ceremonial or religious, thereby violating the establishment clause. An Oregon appeals court heard a challenge raised by a school valedictorian who objected to a commencement prayer.[50] The court concluded that the prayer created the impression that government was endorsing religion, finding that the practice violated the Oregon Constitution. The court also awarded attorneys' fees based on the fact that the state claim was factually identical to the plaintiffs' federal civil rights claim.

A challenge to state immunization requirements was mounted on fourteenth amendment equal protection grounds and an alleged violation of "privacy rights." The plaintiffs held that they subscribed to a belief in "chiropractic ethics," which taught them that the injection of foreign substances into the body is harmful. They argued that the belief should be accorded equal weight with religious exceptions to immunization. A district court rejected these arguments.[51] The court found that the state's interest in public health outweighed any privacy interest and that the parents' philosophical belief could not be accorded equal weight with any prospective religious claim that might be made on behalf of the parents. Thus the equal protection argument was rejected and the school district won a summary judgment in favor of the immunization.

First Amendment Freedom of Expression

A nominating speech at a student assembly led to a decision by the United States Supreme Court that schools may impose disciplinary sanctions for offensively lewd and indecent speech. The controversial nomination was delivered at a student-run assembly by a high school senior who described his candidate, using sexual metaphor, as one who would "go to the very end—climax" on behalf of students in his school. The speech caused a substantial response from those at the meeting and resulted in a two-day suspension for the speaker.

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[48] Parents' Ass'n of P.S. 16 v. Quinones, 803 F.2d 1235 (2d Cir. 1986).

[49] 403 U.S. 602 (1971).

[50] Kay v. David Douglas School Dist. No. 40, 719 P.2d 875 (Or. Ct. App. 1986).

[51] Hanzel v. Arter, 625 F. Supp. 1259 (S.D. Ohio 1985).

The school argued that it had the obligation to promote "civil discourse" and that the penalty was appropriate to the disruption it had caused. A lower court issued an injunction against the suspension and the plaintiff's removal from a list of potential graduation speakers to be voted on by students. In the meantime, the student had been elected a speaker on a write-in vote. The court also awarded $278 as damages, plus costs and attorneys' fees. The Ninth Circuit affirmed, basing its decision on the fact that no "material disruption" had occurred and that the school's reliance on the need to have "civil discourse" and to prevent "indecency" was overly broad.[52]

The Supreme Court reversed, holding in a seven-to-two decision that the Ninth Circuit had not accorded appropriate weight to the school district's obligation to protect minors from offensive, sexually explicit language.[53] The Court also found that the student had received adequate notice, from teachers who had read his remarks prior to their delivery, that his speech might lead to disciplinary sanctions, and that the school rule against "obscene" language was not overly broad when the penalty was only a short suspension. "A high school asembly," the Court held, "is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students."[54]

The extent to which school buildings, grounds, or publications are public forums was at the heart of a number of 1986 free expression cases. The Federal Equal Access Act,[55] passed by Congress in 1984, requires school districts receiving federal funds and having a "limited open forum" to make space available to students for meetings without regard to the programmatic content of the meeting. The Act was designed to extend the Supreme Court's ruling in *Widmar*, requiring access to meeting space for university student prayer groups, to the secondary school level. As the cases that follow demonstrate, however, the Act also has a substantial impact on requests from groups wishing to challenge draft registration and other social and political issues.

Access cases also rely on definitions of what constitutes a public forum, as set forth in *Perry Education Association v. Perry Local Educa-*

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[52] Fraser v. Bethel School Dist. No. 403, 755 F.2d 356 (9th Cir. 1985). *See* The Yearbook of School Law 1986 at 102-3.

[53] Bethel School Dist. No. 403 v. Fraser, 106 S. Ct. 3159 (1986).

[54] *Id.* at 3166.

[55] 20 U.S.C.A. § 4071 *et seq.* (Supp. 1985).

tors' Association.[56] *Perry* enumerated three categories of forums—public, limited public, and nonpublic. Which of the three categories a particular forum or space may constitute, and the ability of a school to regulate speech within the forum, were argued in several of the cases that follow.

Attempts by a high school student organization to hold a "Peace Fair" continued to be litigated in 1986. The Lower Marion, Pennsylvania, school board had held that the proposed activity was political in nature and a district court refused to grant a permanent injunction against the board's decision.[57] This ruling was upheld by the Third Circuit Court of Appeals, but a second lower-court decision, that the Equal Access Act did not apply, was remanded for a further hearing.[58] The Third Circuit remanded on the ground that the district court had incorrectly concluded that the Act was not meant to require open forums that included nonstudents, if such was the history of the forum in question. Thus the lower court was asked to discover whether the Lower Marion board had created this type of forum through its use of the school facilities after August 11, 1984, when the Act was signed.

The lower court examined the use of four separate areas on school grounds since the 1984 date.[59] It found that one spot, the boy's gym, had been used for a public volleyball marathon that had involved nonstudents. The court therefore concluded that this created a limited open forum and that a failure to allow the Saturday peace program in the same gym would constitute a denial based on the political content of the activity. Thus, while the school could establish reasonable rules, such as requiring participants not to wear street shoes in the gym, thereby preserving the surface of the floor, the school could not deny the first amendment rights of the participants by preventing the event.

Issues of war and peace were also heard by the Ninth Circuit Court of Appeals.[60] A suit was filed by a San Diego counseling group seeking to advise young men on alternatives to compulsory military service by placing advertisements in five high school newspapers that had published military recruiting advertisements. A district court had denied to issue a preliminary injunction and an appeal was taken. The first issue in the appeal was whether the newspapers were limited public forums, or, as the school district argued, were nonpublic forums. The appeals court concluded that the schools' newspapers were, "at a minimum" a limited public forum. Having allowed the general public access to the papers through advertising, the court held that only a showing of compelling government interest would permit the district to exclude certain types of messages. The district failed to make such a showing and likewise did not convince the court that military recruiting ads were vocational and nonpolitical.

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[56] 460 U.S. 37 (1983). *See also* Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 105 S. Ct. 3439 (1985).

[57] Student Coalition for Peace v. Lower Marion School Dist., 569 F. Supp. 169 (E.D. Pa. 1984).

[58] Student Coalition for Peace v. Lower Marion School Dist., 618 F. Supp. 53 (E.D. Pa. 1985), *rev'd*, 776 F.2d 431 (3d Cir. 1985).

[59] Student Coalition for Peace v. Lower Marion School Dist., 633 F. Supp. 1040 (E.D. Pa. 1986).

[60] San Diego Comm. Against Registration and the Draft v. Governing Bd. of Grossmont Union High School Dist., 790 F.2d 1471 (9th Cir. 1986).

The Ninth Circuit Court also concluded that the failure to run the advertisements would constitute viewpoint discrimination even if the newspapers were nonpublic forums, as alleged by the district. Having concluded that military recruiting ads were of a mixed political and commercial nature, the schools could not accept them without providing equal access to an opposing point of view. The court also held that a "speculative" conclusion that the ads might lead to illegal conduct on the part of readers was not grounds for excluding them. In dissent, one judge on the three-judge panel argued that the case should have been remanded for a hearing on the question of viewpoint discrimination.

Peace activists sought the right to post and distribute literature in Atlanta's schools and to participate in "career days" where military recruiters would be present.[61] The school district and the federal government, as intervenor-defendant, sought to meet the compelling interest requirement of *Perry* by arguing that the peace activists did not have "jobs in hand," as did the recruiters. It was shown, however, that other career day participants likewise did not offer jobs. The suggestion that the needs of the military should constitute a compelling state interest for giving them "preferred" access also was rejected, since recruiters could contact students outside of school. While granting summary judgment regarding the literature and career day participation, the court deferred until trial the question of whether the merits of military service, generally, could be discussed.

In a more traditional free expression case, a principal removed articles from a school newspaper, *Spectrum*, concerning teenage pregnancy and divorce. He did so on the theory that students could be identified from the text, though no names were used in the story. In responding to the first amendment claims made by the students, a district court focused on the paper's integral connection with the school's journalism curriculum and concluded that there were sufficient grounds for the removal of the stories.[62] The plaintiffs appealed.

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[61] Searcey v. Crim, 642 F. Supp. 313 (N.D. Ga. 1986).

[62] Kuhlmeier v. Hazelwood School Dist., 607 F. Supp. 1450 (E.D. Mo. 1985). *See* The Yearbook of School Law 1986 at 104.

In looking at the nature of the newspaper, the Eighth Circuit Court of Appeals found that the *Spectrum's* own written policy made it a forum for the whole school.[63] While it was produced by a journalism class, the school encouraged students to express their views and they did so frequently. The appeals court then turned to the standard contained in *Tinker v. Des Moines Independent Community School District*[64] and concluded that school officials must demonstrate that the publication prohibition was "necessary to avoid material and substantial interference with school work or discipline . . . or the rights of others." The appeals court found no evidence of potential disruption and focused on whether the rights of others might be invaded by the stories. While a potential invasion is difficult to assess, courts have held that such items as a questionnaire on sex practices would meet the definition.

In the case at hand, the court concluded that only those with prior knowledge of the identities of the students or parents in the divorce article could identify particular cases. Similarly, the pregnancy article disguised identities and the subjects had participated willingly. The court therefore reasoned that neither story was an invasion of anyone's rights. The court also held that the principal had been obligated to give students the opportunity to alter their articles to conform to his concerns regarding specific identities. In dissent, one judge held that the *Spectrum* was a part of the school curriculum and that the decision forced school officials "to chart a course between the Scylla of a student-led first amendment suit and the Charybdis of a tort action by those claiming to have been injured by the publication of student-written material."[65]

A school play, *Runaways*, became the issue in a first amendment lawsuit when the East Montpelier, Vermont school board voted against its selection as a high school's spring musical.[66] The suit was brought by teachers who had selected the play and by students who had a prospective interest in being in the cast. Both sides addressed the question of whether the board's decision "directly and sharply implicates" the students' first amendment rights. For the district court, its refusal to rule in favor of the plaintiffs rested on the fact that the play remained within the school curriculum, where it was read and discussed in the school's humanities course. This left, then, the question of whether the board should be compelled to accept *Runaways* for public presentation. The court found that the board was appropriately concerned that the play's adult themes, including sexual violence and drug abuse, might be too disturbing for some students. Thus the court granted a summary judgment to the board, holding that the plaintiffs' free expression claims must give way to concerns "for the well-being of the larger student body."

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[63] Kuhlmeier v. Hazelwood School Dist., 795 F.2d 1368 (8th Cir. 1986).
[64] 393 U.S. 503 (1969).
[65] 795 F.2d 1368, 1378-9 (1986).
[66] Bell v. U-32 Bd. of Educ., 630 F. Supp. 939 (D. Vt. 1986).

SANCTIONS FOR STUDENT MISCONDUCT

Suspensions and Expulsions

Litigation involving exclusionary discipline grew in 1986, in large measure because of an increase in the number of drug-related cases in which plaintiffs were expelled for possession or sale of controlled substances. Expulsion cases generally involve claims that procedures were faulty. While most states have statutory requirements regarding expulsion procedures, courts generally grant some latitude to districts in expulsion hearings, so long as students are accorded such fundamental rights as clear charges, representation, and the opportunity to cross-examine witnesses. While the power of schools to punish students for in-school violations is clear, a number of 1986 cases raised the question of the school's power to discipline students for out-of-school violations. Substantive claims also were advanced regarding the use of expulsion for drug use, with courts generally finding that the penalty was not excessive.

Two cases arose out of an undercover police investigation into drug abuse in a Louisiana public school district. In the first, a student produced and smoked a marijuana cigarette in the car of an undercover officer, parked in the school parking lot. The court rejected the student's attempt to bar the testimony of the officer and affirmed the school board's decision to expel him.[67] The student unsuccessfully argued that a state statute prohibited school boards from admitting in expulsion hearings the testimony of persons who were not school employees. The court also held that the confidentiality requirements in the state juvenile code were not applicable in proceedings involving the discipline of pupils.

The second case involved a student who was accused of smoking marijuana in a privately owned trailer located a short distance from the school. The student's subsequent expulsion also was based upon evidence presented by an undercover officer who witnessed the act. Unlike the first case, the student successfully sought injunctive relief from the school board's expulsion decision.[68] The court ruled that a principal's power to expel a student for drug possession is limited to possession on school property or in school buses. The court also found that the student's due process rights had been violated because a lower court allowed the district to add charges not contained in the original expulsion notice.

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[67] Abadie v. Saint Bernard Parish School Bd., 485 So. 2d 596 (La. Ct. App. 1986).

[68] Labrosse v. Saint Bernard Parish School Bd., 483 So. 2d 1253 (La. Ct. App. 1986).

In another case raising the issue of the limits of school authority, a Maine district court held that a student could not be suspended from school for making a vulgar gesture to a teacher after school hours and far from the campus.[69] The court found that the connection between the student's act and the orderly operation of the school was "far too attenuated" to support the discipline charge.

A Mississippi girl lost all credit for a semester when she admitted to school authorities that she had a few sips of beer at home before attending the last day of school.[70] In sustaining a lower court award of $1 for damages, the Mississippi Supreme Court found that the school board's letter to the parents setting a hearing date failed to specify charges as required by state law. The student received no notice of witnesses and there was no evidence that the beer consumption caused disruption in school. The board also acted improperly when it expelled the student while having no rule against off-campus consumption of alcoholic beverages.

An Indiana student who admitted that he had smoked marijuana on school grounds appealed his expulsion on substantive due process grounds, arguing that the penalty was excessive.[71] An appeals court rejected his contention that the school was required to consider whether the violator was brighter or more popular than his peers before it expelled him. Expulsion for the remainder of the school year was not found to be excessive.

In a similar case, a student appealed the decision of a state board of education affirming his expulsion from school for possession of marijuana.[72] The court rejected the student's procedural claims, ruling that he had no right to a hearing officer who is not an employee of the district. The court also concluded that the school district's policy of recommending expulsion for the possession of controlled substances was not excessive, finding it "a commendable effort in dealing with a serious, destructive problem."[73]

An Alabama student who had admitted he brought alcohol onto school grounds challenged the local school board's expulsion decision.[74]

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[69] Klein v. Smith, 635 F. Supp. 1440 (D. Me. 1986).

[70] Warren County Bd. of Educ. v. Wilkinson, 500 So. 2d 455 (Miss. 1986).

[71] Forrest v. School City of Hobart, 498 N.E.2d 14 (Ind. Ct. App. 1986).

[72] Rucker v. Colonial School Dist., 517 A.2d 703 (Del. Super. Ct. 1986).

[73] *Id.* at 705.

[74] Adams v. City of Dothan Bd. of Educ., 485 So. 2d 757 (Ala. Civ. App. 1986).

The court summarily rejected his novel argument that he would be unable to attend school if expelled, leading the expulsion to violate the state compulsory attendance law. It also concluded that the provisions of the student conduct code were clearly stated and constituted a reasonable response to what was a major crisis of drug and alcohol abuse in the local schools.

An Indiana court dealt with the question of whether the claim of students expelled for allegedly possessing marijuana was moot.[75] The students had succeeded in winning a preliminary injunction that allowed them to attend classes for the remainder of the term. Upon an appeal by the school district, the appeals court ruled that the issue of the injunction was moot since the relevant school year had already ended. But it also concluded that the matter of whether they were properly expelled was not moot. Since the record was silent on the question of whether the grades from the disputed semester were necessary for the receipt of their diplomas, the court remanded the case for further proceedings.

High school students who were repeatedly suspended for smoking brought suit challenging the school board's rule prohibiting the offense.[76] The court rejected their claims, holding that the ban on smoking was not comparable to hair length regulations or dress codes. The fact that the district allowed teachers to smoke while denying students the privilege also was found not to constitute an equal protection violation. The court concluded that the purpose of the ban was to "prevent impressionable, susceptible adolescents from becoming addicted to tobacco products," and therefore did not apply to adults.

A high school student who was suspended for violations of the school's drug policy claimed that her due process rights had been violated.[77] After exhausting the available administrative appeals and a defeat in a local court she chose to abandon further relief in the state courts. Instead, she brought suit in a United States district court. The federal court ruled that the suit was barred by collateral estoppel principles since the same issues had been raised and resolved earlier in a local state court.

In a similar case, a former high school student filed identical complaints in state and federal courts alleging that his due process and equal protection rights had been violated by school officials who had expelled him for consuming alcohol at a school-sponsored event.[78] A federal district court granted the involved school officials a stay of federal proceedings pending the resolution of state claims. The federal case had been filed almost two years after the plaintiffs appeared in state court.

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[75] Bremen Pub. Schools v. Varab, 496 N.E.2d 125 (Ind. Ct. App. 1986).

[76] Craig v. Buncombe County Bd. of Educ., 343 S.E.2d 222 (N.C. Ct. App. 1986).

[77] Myers v. Daubert, 633 F. Supp. 45 (E.D. Pa. 1986).

[78] Kent v. Cook, 637 F. Supp. 1005 (N.D. Ind. 1986).

While drug cases predominated in 1986, a number of lawsuits dealt with student insubordination, fighting, and threats of violence. In a West Virginia case, four students were expelled from school for making false bomb threats that resulted in the closing of schools on several occasions.[79] The students requested a writ of mandamus requiring the school to reinstate them. The court refused to issue the writ, finding that the one-year expulsion was not grossly disproportionate to the acts committed. The West Virginia court also noted that the state code limits the length of an expulsion from school to one year. The students were expelled during the spring of 1986 and would miss the fall semester of that year. Recognizing that it would be very difficult to resume classes in the middle of a semester, the court ordered that they be readmitted at the beginning of the 1987 spring semester so that they would not lose more than one year of school credit.

A student who had been behaving aberrantly for several days was suspended and eventually expelled for intruding on several classes with a baseball bat, touching female teachers, and violently resisting arrest. He alleged that his constitutional rights to due process and to medical care had been violated. At the disciplinary hearing he was afforded the opportunity to present his version of the incident, but his attorney was not allowed to examine witnesses or participate in any manner. Following the hearing he was suspended from school for ninety days, and the recommendation was made that he be expelled. An expulsion hearing was held where he and his attorneys were allowed to cross-examine witnesses, as well as present evidence and witnesses on his behalf. A federal district court concluded that the student had received adequate due process.[80] The additional trial-type requirements, such as formal rules of evidence, called for by the student were found not necessary under state law. The court also concluded that it did not have jurisdiction over the question of whether he was denied adequate medical care.

A Pennsylvania high school student challenged a suspension for fighting that would have prevented him from attending his graduation ceremonies.[81] He succeeded in attaining a court order that reinstated him in school and allowed him to graduate with his class, but the school appealed. Even though the student had graduated, the court decided to hear the case because it involved an important public question. It concluded that the student had no property right to attend graduation exercises, but that his suspension was invalid because the school district had failed to adhere to procedural requirements by failing to give him written notice of the reason for the suspension.

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[79] Keith D. v. Ball, 350 S.E.2d 720 (W. Va. 1986).

[80] Sykes v. Sweeney, 638 F. Supp. 274 (E.D. Mo. 1986).

[81] Mifflin County School Dist. v. Stewart, 503 A.2d 1012 (Pa. Commw. Ct. 1986).

Kansas students and their parents contended that their due process rights had been violated by several disciplinary actions taken by school officials.[82] The case involved two separate incidents. In the first, several high school students and two former students admitted that they had participated in vandalizing a local grade school. The students were subsequently suspended and the nonstudents were prohibited from attending any of the local high school's extracurricular events. The second incident involved two students who were repeatedly reprimanded at a basketball game by their school's athletic director for "antagonizing supporters of the opposite team." The following day the principal forbade them from attending the next basketball game. They ignored the order but complied with the principal's instructions that they not attend a later game. The court concluded that the students suspended for vandalism had received all the due process to which they were entitled. It found that although they had been denied a hearing, the fact that the "students admitted their guilt" made one unnecessary. The court also held that students did not have a constitutionally protected right to attend athletic events. Finally, it ruled that the parents had no standing to assert that their own due process rights had been violated. The court found that the school had fulfilled its obligation of giving the parents written notice of the suspension within twenty-four hours and rejected the argument that the parents had the substantive right to challenge the discipline imposed.

A student who allegedly directed obscenities towards school officials challenged disciplinary action taken against her.[83] The student received two five-day suspensions from the school principal and, following a disciplinary hearing, was suspended for the remainder of the school year by the superintendent of the district. The court ruled that the suspension section of the district code did not, at the time, give authority to principals to levy such penalties. While more explicit guidelines had been enacted since the episode, they did not go into effect until the student already had received the penalty. Therefore, her school records were expunged of references to the suspensions. Nevertheless, the court concluded that the superintendent did have the authority to suspend her for the remainder of the year and upheld his decision.

A former high school student brought suit challenging a school board policy of reducing grades for unexcused absences.[84] The court ruled that the student did not have standing to sue because the grade reduction she suffered was in physical education courses that had no impact on her final class standing. It also found that her claim was moot because she had graduated from high school and was about to graduate with a high grade point average from the college of her choice. Finally, the court concluded that the public interest in the grade reduction policy was insufficient to warrant an exception to the mootness doctrine.

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[82] Boster v. Philpot, 645 F. Supp. 798 (D. Kan. 1986).

[83] Underwood v. Board of Educ. of City School Dist., 498 N.Y.S.2d 907 (App. Div. 1986).

[84] Hamer v. Board of Educ., 488 N.E.2d 1096 (Ill. App. Ct. 1986).

Corporal Punishment

Corporal punishment cases arise when the paddling of students, permitted by the laws of some states and the policies of school districts, results in injury claims. Courts generally find for defending school districts, absent claims that policies regulating the penalty were not followed or a showing that the penalty was administered excessively. In one such case, a Louisiana father brought suit when his son came home with bruises on his buttocks and later had signs of what a psychiatrist testified to be "post traumatic stress disorder." A trial court ruled that the student's behavioral history suggested that his need for behavioral counseling was unreleated to the paddling and that the penalty itself was not administered in such a way as to aggravate the boy's preexisting emotional state. An appeals court sustained this ruling.[85]

A Michigan student brought suit for battery and unreasonable use of force against a teacher who used a "full nelson" to wrestle a student to the principal's office. The student had arrived late to class and caused a disruption of student presentations under way at the time, kicking a wastebasket. On appeal, the student's parents challenged the judge's instruction to a jury and raised other procedural and substantive objections to a lower-court verdict favoring the school system.[86] Among these numerous claims, all of which were rejected by the court, the plaintiffs alleged that the lower-court judge had failed to instruct the jury regarding the tenets of Michigan's corporal punishment law. While cases involving corporal punishment in Michigan "are few," the appeals court found the judge's instruction that "reasonable physical force" could be used was an adequate description.

TESTING AND PLACEMENT

Placement cases often are initiated by individuals challenging the use of standardized tests on the grounds that they have the effect of segregating schools along racial lines. While one 1986 case fits this description, there was also a sharp growth in the number of cases filed by parents who believe that their child should be placed in more academically advanced classes or in special programs for the gifted.

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[85] Harrell v. Daniels, 499 So. 2d 482 (La. Ct. App. 1986).

[86] Willoughby v. Lehrbass, 388 N.W.2d 688 (Mich. Ct. App. 1986).

A Pennsylvania school district challenged the order of that state's secretary of education that it provide a mentally gifted student with a special, individualized instruction program in addition to the district's existing enrichment program.[87] The case began when the parents of a gifted child and their school district could not reach an agreement on an appropriate individualized education program. Following a special hearing, the presiding official concluded that the child in question was very advanced academically in spite of his inconsistent school work. The hearing officer recommended that the child participate in the district's enrichment program and that he should receive special, individualized instruction within the normal classroom setting. The state secretary agreed with the recommendation, and the court concluded that the secretary had the authority to determine the appropriate individualized program.

In a similar case, the parents of a student with exceptional mathematics skills challenged an order of the Pennsylvania secretary rejecting a hearing officer's recommendation that the boy be provided with a classroom-taught calculus course.[88] The court concluded that the secretary's finding was reasonable, given the testimony of school officials who felt the student had been taking math courses to the detriment of his other studies and that he had been accelerated "too far and too fast" in mathematics. It also noted that the student could learn additional mathematics without enrolling in a special course.

The parents of another Pennsylvania student who was denied admittance into a gifted education program, because she scored only a 121 instead of the minimum requirement of 130 on an IQ examination, challenged her exclusion on a variety of constitutional grounds.[89] The court found that neither the student's liberty nor property interests were abridged by the lottery and, using a rational relationship test, that the use of the cutoff point was a reasonable means of program entry.

The parents of a New York student identified on tests as being mentally gifted sought a court order compelling their school district to admit the child into its gifted student program.[90] Because of cost constraints, a lottery was employed to select the students for full-time talented and gifted instruction, while the remaining eligible students were afforded the opportunity of participating in a modified, part-time program. The court concluded that state statutes did "not impose . . . an affirmative duty to provide programs for the gifted, nor to place every pupil identified as gifted into an existing program."[91] It also held that the use of a lottery to satisfy the limited size of the program was neither arbitrary nor capricious.

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[87] Centennial School Dist. v. Commonwealth, 503 A.2d 1090 (Pa. Commw. Ct. 1986).

[88] Scott S. v. Commonwealth, 512 A.2d 790 (Pa. Commw. Ct. 1986).

[89] Student Roe v. Commonwealth, 638 F. Supp. 929 (E.D. Pa. 1986).

[90] Bennett v. City School Dist. of New Rochelle, 497 N.Y.S.2d 72 (App. Div. 1985).

The parent of another New York student who was discharged from a high school for the gifted on academic grounds brought legal action seeking her reinstatement.[92] The court refused to intervene, reasoning that her right to an education had not been infringed upon because she was still free to attend her local high school. It also found that she had been given an opportunity by school officials to present her case and that the full formalities of a traditional legal proceeding were not required.

A nonprofit Colorado corporation interested in improving the quality of education received by Hispanic students sought the disclosure of standardized test scores, with the test results coded to indicate the ethnic background of the test takers. A state appeals court overturned a lower court decision and ordered that the records should be disclosed after the names of the students were deleted, the order of the test results scrambled, and the scores coded to reflect whether the test takers were of Anglo or Hispanic origin.[93]

Finally, in a continuation of litigation reported last year, a federal district court considered attorneys' fees in a case that dealt with an allegation that a student was discriminated against by school officials in her placement into a math class of predominantly black students. Following a finding that she had not been a victim of discrimination, the school district moved for a fee award. The court concluded that the student's action was so frivolous and without foundation that the district was entitled to fees.[94]

DESEGREGATION

Desegregation cases in 1986 focused on one of two major issues. The first, reported in the section on plan oversight, concerned claims by districts that they had achieved unitary status and no longer required federal court supervision. Arguments involving the burden of proof necessary to reopen cases in unitary districts were heard by two federal courts of appeal, with the opposite conclusion reached in the two cases.

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[91] *Id.* at 76.

[92] Spencer v. New York City Bd. of Higher Educ., 502 N.Y.S.2d 358 (Sup. Ct. 1986).

[93] Western Servs., Inc. v. Sargent School Dist., 719 P.2d 355 (Colo. Ct. App. 1986).

[94] Bond v. Keck, 629 F. Supp. 225 (E.D. Mo. 1986). *See* The Yearbook of School Law 1986 at 111.

The second issue concerned attempts by school districts and states to avoid paying the multimillion dollar price tag for implementing desegregation plans. Disputes over the financial responsibility for desegregation are reported in the cross-district remedies section. Finally, there were two 1986 state court desegregation cases, causing a reintroduction of that topic heading.

Systemwide Remedies

The Ninth Circuit Court of Appeals ruled in 1984 that busing had been used for "everything except integration" in finding that the San Jose, California, school board had acted with segregative intent in developing a neighborhood school policy and in siting new schools.[95] Following *Columbus Board of Education v. Brinkman*,[96] the appeals court found that the plaintiffs in the case had demonstrated that the school board acted without regard to the "foreseeable consequences" of its decisions on racial balance. The case was remanded to the district court for the development of a remedy.

In developing its response, the school district sought to convince the court that a voluntary magnet program would be adequate. The court, however, ordered a comprehensive plan. A hearing over the details of the plan commenced in late 1985 and resulted in a decision to create five magnet schools and sixteen schools with specialty enrichment programs.[97] While parental choice would initially be used in program selection, forced choice might be required if desegregated schools did not result. Additional portions of the order addressed the appointment of a compliance monitor and other aspects of the plan.

In a decision addressing the education components of a lawsuit involving both housing and school segregation, both sides approved a remedy to address racial imbalance in the schools of Yonkers, New York.[98] A district court had ruled in 1985 that both the city and school board of Yonkers had acted in ways that were intentionally segregative.[99] In its consent decree, the court approved plan details for systemwide desegregation, including the use of magnet schools, busing, and a human relations program to help ensure the plan's effectiveness. A court monitor will be appointed to oversee the process.

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[95] Diaz v. San Jose Unified School Dist., 733 F.2d 660 (9th Cir. 1984). *See* The Yearbook of School Law 1985 at 121-2.

[96] 443 U.S. 526 (1979).

[97] Diaz v. San Jose Unified School Dist., 633 F. Supp. 808 (N.D. Cal. 1985).

[98] United States v. Yonkers Bd. of Educ., 635 F. Supp. 1538 (S.D.N.Y. 1986).

[99] United States v. Yonkers Bd. of Educ., 624 F. Supp. 1276 (S.D.N.Y. 1985).

Cross-district Remedies

Cases in this section involve the presentation of claims that school districts adjacent to those where segregated schools are located, or states through official action, have created or perpetuated segregation. Proposed remedies include state financial assistance to achieve desegregation or cross-district plans that move students to create racial balance. Cross-district cases become complicated when plaintiffs file motions challenging certain aspects of desegregation plans. Most cases reported in this section, then, have been under way for some years and offer little prospect that they will be settled in the near future.

Kansas City's massive magnet plan, involving 70% of the students in the district, was argued before the courts in 1986. At issue before the district court was the division of the $87 million three-year cost for the plan, with local and state defendants seeking to reduce their financial responsibility for the program and related upgrading of facilities.[100] The court's decision ultimately divided the cost on approximately a three-to-one basis for the first two years, with the state paying the largest share. A one-year tax levy rollback was enjoined so that the local defendants could receive part of the funding necessary for its share. The state also was invited to change its laws regarding local board issues so that it would be easier for Kansas City to pass a capital bond issue for school improvements. The mandated state share of the plan would be reduced by the amount of the local bond issue, thereby providing an inducement to the state to change the requirement that two-thirds of the voters approve a bond referendum, making the new requirement a simple majority vote.

A portion of the decision was appealed by plaintiffs in the case, who argued that the district court had erred in finding that Kansas City suburban districts had no effect on segregation in the city. The plaintiffs also argued that the United States Department of Housing and Urban Development (HUD) should not have been dismissed as a party in the case. Division of the cost of the remedy also was at issue in the appeal, which was heard en banc by the Eighth Circuit Court of Appeals.

The appeals court split five-to-three on each of the issues presented, with the dismissal of the suburban and HUD defendants upheld, and a change in the financing plan.[101] While the total sum required for the plan was approved, the local share was increased to 50%. The appeals court observed that a fifty-fifty split had been the rule in similar cases[102] and found that a similar distribution was warranted in the case at hand. In reaching this division, the court observed that the property tax levy for the Kansas City district was significantly lower than that for surrounding suburban school districts.

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[100] Jenkins v. Missouri, 639 F. Supp. 19 (W.D. Mo. 1985).

[101] Jenkins v. Missouri, 807 F.2d 657 (8th Cir. 1986).

[102] Milliken v. Bradley, 433 U.S. 267 (1977); Penick v. Columbus Bd. of Educ., 519 F. Supp. 925 (S.D. Ohio 1980), *aff'd*, 663 F.2d 24 (6th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982).

The Eighth Circuit Court of Appeals, for the ninth and tenth times, also heard appeals from parties involved in desegregation litigation in St. Louis. The case in recent years has focused on financing the plan agreed to in 1983 by St. Louis and surrounding suburban districts. The plan involved the use of magnet schools and voluntary student transfers, supplemented by substantial capital improvements to St. Louis schools. The Eighth Circuit in 1984 approved a funding formula for the plan that required the state to fund one-half the cost of reducing pupil-teacher ratios and the intradistrict magnets plus all the cost of capital and operating costs of the interdistrict magnet schools.[103]

At issue in the first 1986 St. Louis case heard by the appeals court was what the court characterized as "footdragging" by the state defendants.[104] The court praised some of the progress made in implementing the plan, including the fact that 7,000 black students were attending suburban schools, that 60,000 students were participating in part-time integrative programs, and that student-teacher ratios in nonintegrated schools were declining sharply. But the court found the need to "be more precise" regarding the lack of progress it observed in the capital improvement program and the magnet schools, where only a handful of white students had enrolled. The court ordered a goal of 2,000 participants for 1987-88 and 6,000 by 1989-90. After specifying which disputed costs should be included in the state share, the court reaffirmed its previous decisions regarding magnet school and teacher ratio costs.

In its 1984 decision, the Eighth Circuit directed the board to submit a $20 million capital bond issue to the voters. The board did not comply, submitting a larger issue and fighting for its passage. The measure lost, however, and the appeals court again in 1986 ordered the $20 million plan sent to the voters "at the earliest possible date."[105] If the measure again fails, the appeals court ordered the district court to follow procedures for obtaining the funds enumerated in the court's en banc opinion in 1984.

In the second 1986 St. Louis case, the issue of state funding for the intradistrict magnets again was considered.[106] At issue was funding for the specialized components of the magnets. The Eighth Circuit Court remanded the case to the district court with instructions to reexamine the state's responsibility for the expenses. The court also denied the state's request for a rehearing en banc of the appeals court's first 1986 case.

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[103] Liddell v. Board of Educ., St. Louis, 731 F.2d 1294 (8th Cir. 1984), *cert. denied*, 469 U.S. 816 (1984).

[104] Liddell v. Board of Educ., St. Louis, 801 F.2d 278 (8th Cir. 1986).

[105] *Id.* at 284.

[106] Liddell v. Board of Educ., St. Louis, 804 F.2d 503 (8th Cir. 1986).

The responsibility of the state of Texas to pay for desegregation in Lubbock was heard by the Fifth Circuit Court of Appeals.[107] A district court had ruled that the Lubbock district could not seek to require the state to pay a portion of the costs, and this ruling was affirmed on appeal. In earlier litigation, the school district had not pleaded the state as a party in the case, though arguably the state had a role. Having failed to involve the state in earlier litigation, the Fifth Circuit concluded that the school district's current attempt to do so was "belated" and an "end-run" attempt to secure state funds.

Using the United States Supreme Court guidelines in *Milliken v. Bradley*,[108] an Arkansas district court held in 1984 that Little Rock and two adjacent districts had adjusted district boundaries in such a way as to cause interdistrict segregation.[109] The Eighth Circuit Court of Appeals approved most of the lower court's decision, but held, however, that the court-ordered boundary changes exceeded the scope of the violation.[110] The district court's reconsideration of the boundary adjustment was again before the Eighth Circuit in 1986.[111] The district court had ordered a one-time school district boundary intended to promote a sixty-to-forty ratio between black and white students in the Little Rock district. The court went further, however, developing a plan for a flexible system whereby the boundary line would change whenever Little Rock annexed additional territory. The appeals court rejected the flexible approach, holding instead to its previously expressed preference for a school district boundary line set at one point in time. The appeals court reasoned that, should future expansion result in a line that constituted a constitutional violation, the district court then could intervene. The appeals court then approved the district court's slight modification of the line, made since the higher court last considered the case.

A federal district court clarified the standing of certain defendants in Milwaukee's desegregation litigation.[112] Parties in the case were then given leave to file amended complaints. The court also refused to dismiss the central claim in the city's case, holding that twenty-four suburban districts had committed intentional constitutional violations by maintaining vocational and exceptional student programs that involved interdistrict transfers among the suburbs while excluding the city of Milwaukee.

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[107] United States v. Texas Educ. Agency, 790 F.2d 1262 (5th Cir. 1986).

[108] 418 U.S. 717 (1984).

[109] Little Rock School Dist. v. Pulaski County Special School Dist., 584 F. Supp. 328 (E.D. Ark. 1984). *See* The Yearbook of School Law 1985 at 124.

[110] Little Rock School Dist. v. Pulaski County Special School Dist., 778 F.2d 404 (8th Cir. 1985), *cert. denied*, 106 S. Ct. 2926 (1986). *See* The Yearbook of School Law 1986 at 114.

[111] Little Rock School Dist. v. Pulaski County Special School Dist., 805 F.2d 815 (8th Cir. 1986).

[112] Board of School Directors of Milwaukee v. State, 649 F. Supp. 82 (E.D. Wis. 1985).

The school board in Richmond, Virginia sought to require the state to provide additional funding for remedial and compensatory programs, arguing that such programs were necessary to eliminate the vestiges of state-mandated school segregation.[113] For the district court, the claim hinged on whether the school district had demonstrated that the effects of past discrimination had not been eliminated. The court concluded that the district had not met this burden, pointing to the fact that student test scores suggested that Richmond students were competing favorably when compared to state and federal norms. To the extent that the state had some lingering responsibility, its current remedial funding was held to be adequate to meet local needs. The court also emphasized that its decision was directed only at state-mandated segregation, though some segregation attributable to other causes might remain. Finally, without discussion, the court released the district from court supervision, holding that it had achieved unitary status. The Richmond case began in 1961, and the current plan had been under court suspension since 1972.

Desegregation Plan Oversight

Once a school district has attained unitary status and is freed from court supervision, plaintiffs in subsequent litigation have the burden of demonstrating that school boards have acted with intent to segregate pupils on the basis of race.[114] Subsequent population shifts creating racial imbalance in the schools need not necessarily require school boards to take steps to desegregate, so long as boundary decisions or other official actions have not contributed to the resegregation.[115] Two 1986 decisions by federal courts of appeal reached differing conclusions, however, on the question of what power federal courts have to reopen desegregation cases.

The two cases had remarkably similar fact situations. In the first, an appeals court ruled that a school district could stop court-approved busing, observing that the district had acted without an intent to resegregate. In the second, a different federal appeals court held that no showing of intent was necessary because the busing was part of a previous court order. It ordered the busing to continue over the objections of the school board. Adding to the confusion, the United States Supreme Court refused to hear either case. The issue, then, is whether districts have an obligation to maintain previous desegregation agreements under what school boards consider to be changed circumstances.

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[113] Bradley v. Baliles, 639 F. Supp. 680 (E.D. Va. 1986).

[114] *See* Washington v. Davis, 426 U.S. 229 (1976).

[115] *See* Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976).

In the first case, in a decision made in 1984 but published in 1986, a Virginia district court held that the Norfolk public schools could cease a massive busing program involving elementary children.[116] The district had been declared unitary in 1975. The school board's decision to halt the busing was based on its judgment that white flight from the system would be reduced by its termination. The court also ruled that the plaintiffs had failed to show that the board's decision was motivated by discriminatory intent. The district court's decision was affirmed by the Fourth Circuit Court of Appeals.[117] The appeals court agreed that the end of mandatory busing, with a provision for free transportation for minority students desiring it, would offer the best chance of stabilizing enrollment in the district. In a unitary system free from the effects of past de jure discrimination, the court concluded that "the school boards and not the federal court will run the schools, absent a showing of an intent to discriminate."[118]

In a case involving elementary school busing in Oklahoma City, a district court refused to reopen a desegregation case that had been closed in 1977.[119] The school board recently ended busing for students in grades one through four and had reestablished neighborhood schools for students in those grades, while continuing busing for other grades. As a result of the plan, thirty-three of sixty-four elementary schools would be attended by students who are 90% or more from one race. The Tenth Circuit Court of Appeals held that the district court had improperly placed the burden of proof on the plaintiffs to show discriminatory intent.[120] Unlike the Fourth Circuit, the Tenth Circuit found that a previous decision declaring a district unitary was no bar to litigation challenging changes in a previous mandatory injunction. The case, therefore, was remanded for a hearing on the plaintiff's charges.

The conflicting federal courts of appeal decisions were cited by opposing parties in the ongoing litigation involving desegregation in

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[116] Riddick v. School Bd. of Norfolk, 627 F. Supp. 814 (E.D. Va. 1984).

[117] Riddick v. School Bd. of Norfolk, 784 F.2d 521 (4th Cir. 1986), *cert. denied*, 107 S. Ct. 420 (1986).

[118] *Id.* at 543.

[119] Dowell v. School Bd. of Okla. City, 606 F. Supp. 1548 (W.D. Okla. 1985).

[120] Dowell v. School Bd. of Okla. City, 795 F.2d 1516 (10th Cir. 1986), *cert. denied*, 107 S. Ct. 428 (1986).

Chattanooga, Tennessee. A district court had ruled that the Chattanooga plan for desegregation had been fully implemented, save for the portion related to faculty and staff.[121] The court then found that the faculty and staff integration plan was not under way and that it was the last step needed to make a unitary system.[122] The court concluded that, unlike the Oklahoma City plaintiffs, their Tennessee counterparts had been afforded the opportunity to challenge the district's plan and were unable to show that the district was not unitary. The plaintiffs were awarded costs by the court.

A Mississippi district court considered claims by desegregation plaintiffs that previous court orders had been violated and that the Lawrence County school district should be prevented from modifying school attendance zones and that school construction plans should be modified.[123] The court refused to fincd for the plaintiffs and an appeal was made. The Fifth Circuit Court of Appeals first considered what it meant by a 1974 ruling in which it appeared to declare that the district was being run as a unitary school system. The appeals court decided that the term "unitary" referred only to the fact that the system appeared to have complied with an outstanding order.[124] Jurisdiction in the case had been returned to the district court in its 1974 decision and the appeals court now observed that the retention of jurisdiction was further evidence that the case was to continue.

Turning to the substance of the latest appeal, the Fifth Circuit found that the county school board had continued a policy of permitting students to enroll in schools outside their attendance zone, had failed to develop a transportation plan, and had assigned staff without regard to the segregative impact of these actions. The appeals court therefore reversed the district court's decision, ordering the court to modify the attendance zones, take action on teacher assignments, and consider more extensive busing, perhaps with the advice of a court-appointed monitor.

The correct role of the district court in monitoring a desegregation plan was at issue in a brief opinion by the Eleventh Circuit Court of Appeals.[125] A Florida district court had issued an order approving a Duval County school system plan for a school closing and the conversion of another school into a magnet center. While the court had invited the plaintiffs to comment on the plan, it refused their request for a hearing. The appeals court found that the court had an obligation to grant the

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121. Mapp v. Board of Educ. of Chattanooga, 630 F. Supp. 876 (E.D. Tenn. 1986).

122. Mapp v. Board of Educ. of Chattanooga, 648 F. Supp. 992 (E.D. Tenn. 1986).

123. United States v. Lawrence County School Dist., 626 F. Supp. 940 (S.D. Miss. 1986).

124. United States v. Lawrence County School Dist., 799 F.2d 1031 (5th Cir. 1986).

125. Mims v. Duval County School Bd., 784 F.2d 1107 (11th Cir. 1986).

request and had failed to follow established standards for amending a desegregation plan.

The often-stormy litigation involving Chicago's school desegregation plan continued in 1986, with the district court expressing appreciation that the parties had reached at least a partial resolution of the dispute regarding funding for the plan.[126] Funds for two areas, however, remained unsettled, with the federal government claiming that discretionary funds to be used in ten schools did not satisfy federal guidelines requiring innovative programming and that bilingual programs developed by the city also failed to meet federal criteria. On the first point, the court agreed that aspects of the ten-school plan were not innovative, but that the scheme met the innovative requirement when considered in its entirety. The court also sorted out questions regarding the bilingual program, finding that the district could not use student tutors, as it had proposed. The parties were urged to work together to develop programs following the guidance provided in the opinion.

The use of ethnic quotas in a Chicago elementary magnet school also was heard in two 1986 Seventh Circuit cases. In the first, plaintiffs representing Cuban, American Indian, and white students challenged the plan for the magnet school on the ground that admission standards favored other ethnic groups. The appeals court dismissed their appeal for an interlocutory order, holding that the lower court retained jurisdiction over claims raising the same constitutional issues as those asserted by the plaintiffs in their appeal.[127] Hence the appeals court held that it lacked jurisdiction and that the appeal was premature.

Following the Seventh Circuit decision, the district court dismissed the plaintiff's constitutional claim regarding the preferential admissions treatment received by some groups at the magnet school. The plaintiffs then appealed the issue for a second time. In addressing the substance of the issue, the Seventh Circuit court found that the plaintiff's claim represented a collateral attack on a desegregation plan, similar to a previous claim filed earlier that already had been found wanting.[128] The appeals court reaffirmed its view that portions of a desegregation plan might have constitutional infirmities, so long as the overall plan contributed to the goal of desegregation.

Litigation continued in Dallas regarding the use of educational centers for elementary school students.[129] The centers previously had been approved by federal courts as an alternative to busing. The sprawling district, 351 square miles, serves predominantly (78.2%) students from minority groups. In its 1986 decision, the district court again approved the use of centers, this time for grades four through six in North Dallas, concluding that busing no longer contributed significantly to integration and had become, because of white flight, "essentially meaningless" as a desegregation tool.

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[126] United States v. Board of Educ., Chicago, 624 F. Supp. 206 (N.D. Ill. 1986).

[127] Samayoa v. Board of Educ., Chicago, 783 F.2d 102 (7th Cir. 1986).

[128] Samayoa v. Board of Educ., Chicago, 798 F.2d 1046 (7th Cir. 1986).

[129] Tasby v. Wright, 730 F. Supp. 597 (N.D. Tex. 1986). In an earlier decision, the NAACP unsuccessfully sought to reenter the Dallas suit. *See* Tasby v. Wright, 109 F.R.D. 296 (N.D. Tex. 1985).

A Tennessee district court refused a proposal by the Shelby County school board to add classrooms to a largely white school while refraining from redrawing attendance zones to relieve overcrowding.[130] While the zone change would have forced white students to attend schools having a larger proportion of minority children, none of the schools in the county had a majority of minority students in attendance. In ordering a new plan for the district, the court observed that the system had allowed "fear of community opposition" to interfere with its obligation to select a less expensive alternative that also would have furthered desegregation.

Plaintiffs in New York argued that the Queens district, starting in 1970, had made decisions affecting racial balance that now caused the proposed closing of a predominantly black and Hispanic junior high school.[131] They also alleged that the board made other administrative decisions that made the school a more ready target for closing. The district court, however, found that its ability to reopen the entire plan to scrutiny was precluded by previous appeals court decisions and that the other decisions made by the board were "wholly insufficient" to serve as evidence that the board had intended to close the school.

The city of Jefferson, Georgia appealed an unpublished district court order declaring that the schools of Jackson County had achieved unitary status.[132] In a per curiam decision, the Eleventh Circuit concluded that the district court should be upheld, even though it "incorrectly reasoned its way to that decision." The United States, as a party in the case, had urged that unitary status should be defined to mean that all previous orders in the case would be dismissed by such a declaration. This perspective was rejected by the appeals court, with the observation that parties would never negotiate equitable settlements to desegregation disputes if these might be dissolved in the future. The correct ground for the declaration that the Jackson County case had ended, then, was the fact that the district court's 1970 order in the case had been complied with by the parties.

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[130] Robinson v. Shelby County Bd. of Educ., 743 F. Supp. 111 (W.D. Tenn. 1986).

[131] Parent Ass'n of P.S. 50 v. Queens Community School Dist. No. 28, 625 F. Supp. 1505 (E.D.N.Y. 1986).

[132] United States v. Board of Educ. of Jackson County, 794 F.2d 1541 (11th Cir. 1986).

State Court Cases

A Texas appeals court considered an appeal by parents that their school district be prevented from implementing a change in school attendance zones. The change was designed to address changing ethnic compositions in two high schools. It applied only to students scheduled to enter the schools, allowing others to finish their high school programs in the school where they originally enrolled. It also contained a provision exempting siblings from having to attend a different school. The appellants argued that the board had violated the state education code and that the board had no power to address de facto segregation caused by changing residential patterns.

The appeals court found for the defending district, holding that the absence of a court order did not prevent the district from seeking further integration.[133] The state appeals court found the district had ample authority for its action, citing *Swann v. Charlotte-Mecklenburg Board of Education*.[134] The court also held that the plan was not a "transfer" of students to another school, that can be made under the state code only on a case-by-case basis. Instead, the issue was a boundary rezoning that fell within the broad powers of district boards to effect.

An Illinois school board argued that the state had no power to withhold funds for a local gifted program, following a unilateral finding by the state that the program was operated in a discriminatory manner. The district argued that the state had no power to insist that the local program designate spaces in the program for minority students. The state, in turn, argued that the program was intentionally segregated by race and that the doctrine of sovereign immunity precluded the local suit. An appeals court rejected the state's claims and found for the local district.[135] At the heart of the court's decision, it was held that the state's action had not afforded the district any opportunity to contest the finding of racial segregation in the program's operation. The proper course of action for the state, the court concluded, was to file a complaint with the state attorney general. Otherwise, the state board was assuming the role of "prosecutor, judge, and enforcer of its own sanctions."

Attorneys' Fees

Attorneys' fees cases in desegregation litigation often become as complicated as the original cases themselves, with questions raised as to who was the "prevailing party" and what charges might be proper. Courts frequently are guided by the twelve factors found in a Fifth Circuit case when seeking to determine appropriate fees.[136] *Hensley v. Eckerhart*[137] also admonishes courts to guard against overcharging and double billing. These matters were considered in two 1986 fee cases heard by the Eighth Circuit Court of Appeals.

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[133] Citizens for Better Educ. v. Goose Creek Consolidated Indep. School Dist., 719 S.W.2d 350 (Tex. Ct. App. 1986).

[134] 402 U.S. 1 (1971).

[135] Board of Educ., Peoria v. Sanders, 502 N.E.2d 730 (Ill. Ct. App. 1986).

The state of Arkansas challenged a district court decision that it was liable for both attorneys' fees and desegregation costs in Conway County. The court had reinstated the state as a defendant in the case in 1980, seven years after it was originally dismissed. The Eighth Circuit found that, although it was uncertain what evidence the state might present to "insulate itself from liability," the district court nevertheless had an obligation to hold a hearing to afford the state an opportunity to contest its liability.[138] As to the fees, the Eighth Circuit ruled that they could be assigned by the court for the expenses associated with the state's challenge as to its liability, but they could not be awarded to the local school districts for the seven years when the state was not a party in the case.

Intervenors in the Little Rock desegregation case sought both fees and a 50% "enhancement," because of the contingent nature of the representation they afforded. The Eighth Circuit, en banc, awarded the fees, distributed among the state and three districts that were participants in the case, finding no special circumstances under which the enhancement was warranted.[139] In dissent, three judges would have adjusted the percentages of the fees charged to the districts in a different way.

Litigation continued in the award of fees first made in 1984 in the desegregation litigation in Prince George's County, Maryland.[140] In this latest round of litigation, the district court was asked to approve the payment of the $373,000 in fees over a two-year period, to take into account the fiscal difficulties experienced by the school district.[141] The court approved this plan and set specific payment dates that compromised the schedules proposed by the opposing parties. The court also set a starting date for the accrual of interest charges on the award.

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[136] Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974).

[137] 461 U.S. 424 (1983).

[138] United States v. Arkansas, 791 F.2d 1573 (8th Cir. 1986).

[139] Little Rock School Dist. v. Pulaski County Special School Dist., 787 F.2d 372 (8th Cir. 1986).

[140] Vaughns v. Board of Educ. of Prince George's County, 598 F. Supp. 1262 (D. Md. 1984). *See* The Yearbook of School Law 1985 at 130-31. *See also*, Vaughns v. Board of Educ. of Prince George's County, 770 F.2d 1244 (4th Cir. 1985) (fee enhancement award was an abuse of discretion by the district court).

[141] Vaughns v. Board of Educ. of Prince George's County, 627 F. Supp. 837 (D. Md. 1985).

Further fees, for activity since the court's 1984 decision, also were addressed by the court. After some discussion, the court adjusted the requested fees and indicated that future disputes regarding fees in the case would be resolved by a court-appointed master, if the parties could not agree to a division. Cost of the master would be taken from the parties in a percentage proportionate to their final award.

EA [illegible] p 118-141

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HANDICAPPED

Nelda H. Cambron-McCabe

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INTRODUCTION

Litigation addressing the rights of handicapped students and employees remained at a high level in 1986. The largest number of cases involved parental requests for reimbursement of private school tuition. In the wake of *Burlington School Committee v. Department of Education*, courts attempted to assess the appropriateness of parental placements and the inappropriateness of educators' proposed public school placement.[1]

The most far-reaching legal activity occurred in the legislative arena. Congress's concern over the inability of prevailing parents to recover attorneys' fees led to the passage of a new law. Additionally, the Education of the Handicapped Act was amended to encourage states to support programs for three to five year old handicapped children.

ENTITLEMENT TO SERVICES

The Education of the Handicapped Act (EHA) mandates that services must be available for all handicapped children between the ages of three and twenty-one. School districts, however, are not required to provide programs for handicapped children below the state's minimum school age unless programs are provided for nonhandicapped children in this age group. With the passage of the Education of the Handicapped Amendments Act of 1986, Congress provided strong incentives for states to serve three to five year old children.[2] If states do not serve these children, they will lose funds appropriated for the preschool programs and will not be allowed to count three to five year old children under the basic grant. Also, in the 1986 amendments, a new state grant was authorized to enhance the development of handicapped infants and toddlers from birth to age two. Lawmakers hope that early intervention will minimize the need for services when the children reach school age. Handicapped infants and toddlers are defined as those children who need early intervention services because of developmental delays or physical or mental conditions that may result in developmental delays.

Children who were not provided a free appropriate education program prior to the 1977 effective date of the EHA have been unable to allege a denial of services under the law. The Sixth Circuit and Ninth Circuit Appellate Courts rejected two students' claims of entitlement to services in 1986. The Ninth Circuit Court noted that the Act had not been applied retroactively by courts unless administrative actions were pending when the law became effective.[3]

The designation of a child as handicapped and eligible for special services is contingent upon the child being evaluated as having special learning needs because of a health impairment. "Health impaired" is defined in federal regulations as "having limited strength, vitality or alertness due to chronic or acute health problems . . . which adversely affect a child's educational performance."[4] A New York court concluded that, under the EHA's definition of a handicapped child, children with Acquired Immune Deficiency Syndrome (AIDS), AIDS-Related complex, or the Human T-Lymphotropic Virus, Type III (HTLV-III) antibody are not eligible for referral to a committee for evaluation.[5] The court, however, acknowledged that a child with AIDS might become eligible for special services if his condition deteriorated.

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[1] 105 S. Ct. 1996 (1985).

[2] P.L. 99-457.

[3] Gallagher v. Pontiac School Dist., 807 F.2d 75 (6th Cir. 1986); Alexopulos v. Riles, 784 F.2d 1408 (9th Cir. 1986).

PROCEDURAL SAFEGUARDS

Extensive procedural safeguards are identified in the EHA to ensure appropriate identification, evaluation, and placement of handicapped children. Prior to the evaluation of a child, parents must be informed of their procedural rights, including a description of the process and procedures, and of the right to an impartial due process hearing to present complaints. The judiciary has been called upon frequently to interpret specific procedural rights and to assess school officials' compliance.

Development of Individualized Education Programs

A handicapped child's individualized education program (IEP) may be found inappropriate based on a school district's violation of procedural provisions of the EHA. Failure to provide written notice to parents of their right to seek a due process hearing alone was inadequate to establish that an Illinois child had been denied an appropriate education.[6] In this case, a federal district court held that the school district's behavior was consistent with the EHA's basic purpose and intent of ensuring parental participation in the development of a child's program. The parents were involved in assessing all services that their child would receive, and no placement was made without their involvement and consent.

Change in Placement

Prior to a change in a handicapped student's placement extensive procedural safeguards must be provided. Courts in 1986 addressed what alterations in a program constitute a change, and when parents are justified in unilaterally changing their child's placement.

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[4] District 27 Community School Bd. v. Board of Educ. of City of New York, 502 N.Y.S.2d 325, 339 (Sup. Ct. 1986), *citing* 34 C.F.R. § 300.5(b)(7).

[5] *Id.*

[6] Max M. v. Illinois State Bd. of Educ., 629 F. Supp. 1504 (N.D. Ill. 1986).

Program Modification. Before a change in a substantive aspect of a handicapped student's program, written notice must be given to the parents. All changes, however, may not constitute a "change in educational placement" necessitating notice. In a Massachusetts case, parents challenged the lack of notice of a change in their child's after-school program.[7] The handicapped child was enrolled in two different private extended day-care programs for nonhandicapped students in the same school—two afternoons a week in one program and three afternoons in another. A change was necessitated in the child's program when one of the programs refused to continue his enrollment because of an age limitation. The parents requested full time enrollment in the other program, but the school district was able only to increase the program to three afternoons and then provide an individualized program in the same school for two afternoons. The parents challenged the lack of written notice prior to the change, and the state review agency held that notice was required under the EHA regulations. The Massachusetts Federal District Court disagreed, finding that the modification in the program did not constitute a change in the child's educational placement. To constitute a change, the court held that a modification must have a significant affect on the learning experiences offered the child. The changes in this instance were found to be superficial—same location, personnel, and amount of time, and the provision of similar learning opportunities in a mainstream program.

The Ninth Circuit Court of Appeals, however, found that the reduction of a student's full-day program schedule to a part-day schedule following several incidents of misbehavior without an IEP conference violated the student's rights under the EHA.[8] While the guardians were aware that the student's program had been reduced because of misbehavior, they were not notified of their right to object or to seek review of the decision.

Exclusion from School. Exclusion of a handicapped child from school is a change in educational placement and must be preceded by written notice. The Fifth Circuit Court of Appeals held that a school district violated a child's EHA notice rights by unilaterally excluding him from school after a court-ordered two-month stay in a state hospital for evaluation and treatment.[9] The school officials' exclusion was based on fear that the student's return to school for the final month of classes might endanger his safety or the safety of other students. The officials, however, did not convene the student's program committee at that time or at the beginning of the next school year to determine his placement. After the parent filed a complaint, a conference was held, but the parent rejected the school district's proposed residential placement and a two-year legal battle ensued.[10] After concluding that the school officials' failure to hold an IEP conference was a *per se* violation of the EHA, the appellate court remanded the case for a determination of the student's loss: Did the loss include the entire appeal period or simply the spring and fall denial (parent's obstinance may have been responsible for the two-year loss)? What remedy would be appropriate for the loss (a monetary award or remedial services)?

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[7] Brookline School Comm. v. Golden, 628 F. Supp. 113 (D. Mass. 1986).

[8] Doe v. Maher, 793 F.2d 1470 (9th Cir. 1986).

[9] Jackson v. Franklin County School Bd., 806 F.2d 623 (5th Cir. 1986).

Placement During Due Process Proceedings. Section 1415(e)(3) of the EHA, often referred to as the "stay put" or "status quo" provision, provides that "[d]uring the pendency of any proceedings conducted . . . unless the state or local educational agency and the parents or guardian otherwise agree, the child shall remain in the current educational placement of such child . . . ." While the purpose of this provision is to provide stability and continuity in a child's educational program, until 1985 it had interferred with a parent's ability to alter an inappropriate placement during a lengthy review process; courts had generally held that unilateral placement was a bar to reimbursement of private school tuition. The United States Supreme Court in 1985 in *Burlington School Committee v. Department of Education* ruled that tuition costs could be recovered by parents if it were determined that the private placement was appropriate and the public school placement was inappropriate.[11]

Several courts applied the *Burlington* decision in 1986. In two cases, courts held that parents' were justified in the unilateral placement of their children in private facilities. The Third Circuit Court of Appeals affirmed a New Jersey federal district court decision holding that a school system's proposed day school program was inadequate for a neurologically impaired and trainably mentally retarded child.[12] Similarly, a New York federal district court found the mainstreaming of a neurologically impaired middle school student to be inadequate and inappropriate.[13] The parents in both cases were awarded tuition reimbursement for private placement expenses. In a third case, a Virginia federal district court confirmed that unilateral placement by parents was not an automatic bar to tuition reimbursement.[14] The case was remanded to the administrative level to consider the appropriateness of the public and private placements.

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[10] While this case was pending, the student requested a preliminary injunction to permit him to return to his "current placement" in the school district. The Fifth Circuit Appellate Court denied the request, holding that a school system can exclude a student during an IEP appeal if the student poses a danger in the school environment. Jackson v. Franklin County School Bd., 765 F.2d 535 (5th Cir. 1985). *See* The Yearbook of School Law 1986 at 125, 133.

[11] *See* The Yearbook of School Law 1986 at 128-29.

[12] Board of Educ. v. Diamond, 808 F.2d 987 (3d Cir. 1986).

A New York federal district court again interpreted "current educational placement" under the 1982 *Jose P.* order which authorized parents to enroll their handicapped children in private schools at a school district's expense if a placement was not made within sixty days of the request for review.[15] Following such a private placement, if a parent finds the educational placement proposed by a school district unacceptable, the court held that the child may remain in the current educational placement, which is the private placement, until all impartial review proceedings are completed.

While the Fifth Circuit Appellate Court in 1985 held that school personnel can remove a student from school without parental consent during an IEP appeal if the student poses a danger in the educational setting,[16] the Ninth Circuit Court of Appeals' disagreed sharply with that position.[17] The Ninth Circuit Appellate Court found an indefinite removal of a student from school pending the resolution of a lengthy appeal process to be a violation of the "stay-put" provision. The court, however, did not find that a brief suspension authorized by state law conflicted with the EHA provision.

Administrative Remedies

Prior to initiating a judicial challenge to a school district's actions regarding educational placement and services under the EHA, a parent must exhaust available administrative remedies. A New York parent was denied tuition reimbursement for a unilateral private placement of his handicapped child because he did not pursue the required administrative proceedings.[18] After a committee on the handicapped had been unable to find a placement for his child in a state-approved facility, he placed the child in a private school and then initiated judicial proceedings to compel the commissioner of education to pay the expenses. In the absence of administrative review, a New York appellate court dismissed the legal proceedings.

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[13] Eugene B. Jr. v. Great Neck Union Free School Dist., 635 F. Supp. 753 (E.D.N.Y. 1986).

[14] Linkous v. Davis, 633 F. Supp. 1109 (W.D. Va. 1986).

[15] Board of Educ. v. Ambach, 628 F. Supp. 972 (E.D.N.Y. 1986).

[16] *See* Jackson v. Franklin County School Bd., 765 F.2d 535 (5th Cir. 1985).

[17] Doe v. Maher, 793 F.2d 1470 (9th Cir. 1986). *See also* text with note 57, *infra*.

[18] Semel v. Ambach, 505 N.Y.S.2d 466 (App. Div. 1986).

Litigation continued this year in another New York case. In 1985 a father, who had not exhausted state administrative procedures because he concurred with the local committee's decision, was denied an injunction to compel the state to place his daughter in a private facility that had been recommended by the local committee but had been removed from the state approved list.[19] After the 1985 decision, the father sought a review of the committee's decision, which was upheld by a hearing officer but was rejected in a review initiated by the commissioner of education. The federal district court in 1986 held that under federal requirements the administrative remedies are exhausted after the hearing officer's decision unless an aggrieved party appeals the decision.[20] Accordingly, the hearing officer's decision was final, and the commissioner did not have the authority to review the decision as to whether the child was handicapped and the type of educational or related services required. The court, however, concluded that a trial was necessary to consider the financial responsibility of the state regarding educational and medical needs of the child, the approval status of the private facility, the facility's suitability to meet the child's needs, and the possibility of alternative placements.

While parents must generally exhaust administrative remedies, courts have recognized exceptions if it appears that administrative relief would be unproductive. Three cases in 1986 reinforced this principle. A Florida federal district court held that administrative exhaustion was not required in a case involving broad scale racial misclassification claims; the administrative remedies were found to be inadequate to resolve the claim.[21] Similarly, the Ninth Circuit Court of Appeals concurred that parents are not required to exhaust administrative proceedings if they would be futile or inadequate.[22] Furthermore, the court held that the guardians in this case were not required to allege in the legal complaint that administrative review would be inadequate or futile because the school district did not inform them of the available safeguards and channels for review. A New York federal district court held that prior administrative review is not required when the claim itself involves the adequacy of those review procedures.[23]

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[19] See The Yearbook of School Law 1986 at 125.

[20] Antkowiak v. Ambach, 638 F. Supp. 1564 (W.D.N.Y. 1986).

[21] S-1 v. Turlington, 646 F. Supp. 1179 (S.D. Fla. 1986).

[22] Doe v. Maher, 793 F.2d 1470 (9th Cir. 1986).

[23] Louis M. v. Ambach, 113 F.R.D. 133 (N.D.N.Y. 1986). See The Yearbook of School Law 1986 at 126.

Several courts found that specific elements of the administrative review procedures were flawed. A Mississippi federal district court held that a state review team composed of officers and employees of local school districts did not constitute an "impartial panel" as required by the EHA.[24] A federal district court found that the Pennsylvania administrative review procedures violated several aspects of the EHA.[25] The court held that, for state-level review purposes, the secretary of education was not an impartial hearing officer because she was an employee of the state department of education. The court also held that a state-level decision cannot be remanded to the local level to seek additional evidence. A Florida appellate court ruled that the role of a hearing officer is limited to determining whether a school district's proposed placement is appropriate; a hearing officer cannot order a particular placement.[26] While the court found that the hearing officer in this case exceeded his authority by ordering a residential placement, it noted that he could have remanded the issue to the school district with his recommendation. A Michigan appellate court held that a state review official should have permitted a school district to submit a brief or to present oral argument since the parents submitted a statement.[27]

PLACEMENT

After agreement is reached on a child's individual education program, an appropriate placement must be made at public expense. Alternative placements may include a regular classroom with support services, a regular classroom supplemented with resource room instruction, self-contained special classes, home instruction, and hospital or institutional instruction. Within this continuum of placements, a child must be educated in the least restrictive environment (LRE), which may be in a public or private school system depending on the needs of the child and the availability of an appropriate program.

Least Restrictive Environment

The EHA ensures that "to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped."[28] This least restrictive environment or mainstreaming provision was the basis for an Eighth Circuit Appellate Court decision in which the parents sought a preschool placement in a private program that served both handicapped and nonhandicapped students in an integrated setting.[29] The parents had rejected the area education agency's recommendation of placement in a regular elementary school special class that served only handicapped students. While the appellate court emphasized the importance of mainstreaming, it stated that the EHA "creates a clear preference for *public* educational placement when that placement is not inconsistent with the mainstreaming provisions of the [A]ct."[30] The court did not find an inconsistency in placing the preschooler in an all-handicapped class as it did not view the EHA as requiring that handicapped children must be educated in the same classroom with nonhandicapped students. The court stated that the child "at the very least, will be educated *in the same school* with nonhandicapped children."[31] Furthermore, the court noted that Iowa does not provide integrated preschool programs, and the EHA does not require states to establish new levels of services to meet the mainstreaming mandate. The United States Supreme Court declined to review the case.

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[24] Kotowicz v. Mississippi State Bd. of Educ., 630 F. Supp. 925 (S.D. Miss. 1986). The court also held that a review team must make specific written findings of fact and conclusions of law to support its decision.

[25] Muth v. Smith, 646 F. Supp. 280 (E.D. Pa. 1986).

[26] Hendry County School Bd. v. Kujawski, 498 So. 2d 566 (Fla. Dist. Ct. App. 1986).

[27] Nelson v. Southfield Pub. Schools, 384 N.W.2d 423 (Mich. Ct. App. 1986).

The Third Circuit Court of Appeals briefly addressed mainstreaming in a residential placement challenge.[32] The school district argued that a special day program must be preferred over a residential placement under the least restrictive environment requirement.[33] In rejecting this argument, the court defined the least restrictive environment as an environment "in which educational progress rather than educational regression can take place."[34] Accordingly, the court noted that a residential placement may be the least restrictive depending on a student's disability. Similarly, a New York federal district court held that the least restrictive environment must be determined by assessing an individual child's abilities and needs.[35] For a severely multiple handicapped student, the court found that a special private facility offered the least restrictive environment.

Private Facilities

In 1986, as in previous years, one of the most litigated issues under the EHA was who must pay the cost of educating a handicapped child in a private facility. The federal law clearly requires public school districts to place handicapped children in private facilities if an appropriate public placement is not available.[36] If parents select a private placement when an appropriate public one is available, they must bear the cost. However, under the Supreme Court's 1985 decision in *Burlington School Committee v. Department of Education*, parents who unilaterally place their children in a private facility pending resolution of a placement may be awarded tuition reimbursement if it is determined that the private placement is appropriate and the public school placement is inappropriate.[37]

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[28] 20 U.S.C. § 1412(5).

[29] Mark A. v. Grant Wood Area Educ. Agency, 795 F.2d 52 (8th Cir. 1986), *cert. denied*, 55 U.S.L.W. 3644 (1987).

[30] *Id.* at 54.

[31] *Id.*

[32] Board of Educ. v. Diamond, 808 F.2d 987 (3d Cir. 1986).

[33] *See* text with note 38, *infra*.

[34] *Id.*, 808 F.2d at 992.

[35] Taylor v. Board of Educ., 649 F. Supp. 1253 (N.D.N.Y. 1986).

Relying on *Burlington*, the Third Circuit Court of Appeals and a New York federal district court ordered reimbursement of tuition costs for appropriate private placements when the evidence showed that the public school placements were inadequate.[38] The New York federal district court in a second case, however, found that a school district's proposed program that enabled a handicapped child to receive educational benefits was appropriate.[39] According to the court, the critical point in assessing appropriateness is not whether one program is better than the other, but whether the child benefits educationally from the public school placement. An Illinois appellate court denied tuition reimbursement to parents for a private placement in a nonapproved institution.[40] The court held that while a private placement selected by parents must be appropriate it also must be one that a school district has the authority to provide. In two cases, courts rejected school officials' motions to dismiss, determining that parents had alleged violations of the EHA that might justify tuition reimbursement depending on the appropriateness of the programs.[41]

Parents in a Hawaii case sought a preliminary injunction to require the state to place their handicapped child in a private residential facility pending the outcome of the judicial review process.[42] Based upon the inadequacy of the department of education's program, the lack of financial ability of the guardians, and potential injury to the student, the Hawaii federal district court ordered the state to fund an appropriate residential placement.

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[36] An appropriate education is one that is designed to meet the unique needs of each child and includes special education and related services; it does not require sufficient services to maximize each child's potential. *See* Max M. v. Illinois State Bd. of Educ., 629 F. Supp. 1504 (N.D. Ill. 1986); Hendry County School Bd. v. Kujawski, 498 So. 2d 566 (Fla. Dist. Ct. App. 1986).

[37] 105 S. Ct. 1996 (1985). *See* Yearbook of School Law 1986 at 128-29.

[38] Board of Educ. v. Diamond, 808 F.2d 987 (3d Cir. 1986); Eugene B. Jr. v. Great Neck Union Free School Dist., 635 F. Supp. 753 (E.D.N.Y. 1986).

[39] Manuel R. v. Ambach, 635 F. Supp. 791 (E.D.N.Y. 1986).

[40] Taglianetti v. Cronin, 493 N.E.2d 29 (Ill. App. Ct. 1986).

[41] Gerasimou v. Ambach, 636 F. Supp. 1504 (E.D.N.Y. 1986); Linkous v. Davis, 633 F. Supp. 1109 (W.D. Va. 1986).

[42] Department of Educ. v. Mr. and Mrs. S., 632 F. Supp. 1268 (D. Hawaii 1986).

Courts have not required educational agencies to place handicapped students in out-of-state private schools when appropriate placements exist within the state. A Pennsylvania commonwealth court denied parents' request for an out-of-state placement, finding that an appropriate in-state private program could be provided.[43] Similarly, a Virginia federal district court rejected parents' request to place their child in an unapproved out-of-state residential school; the child had been accepted for admission by an approved in-state private school.[44]

Litigation again highlighted the difficulty of separating educational, medical, and social problems in determining the appropriateness of residential placements. A Virginia appellate court noted that an inquiry must determine whether a residential placement is "a necessary ingredient for learning."[45] Although the court observed that the emotional disability of the handicapped child in this case could be more thoroughly addressed in a structured residential placement, the court concluded that the child's significant educational progress in special education classes demonstrated that the school district had met its obligation under the EHA. In a New York case, a federal district court held that in a trial on the merits of a residential placement the court must determine whether the placement is necessitated by educational, emotional, or social needs.[46]

RELATED SERVICES

Under the EHA, an appropriate education includes related services "required to assist a handicapped child to benefit from special education."[47] Controversies in 1986 involved transportation, in-school nursing care, psychotherapy, and extracurricular activities.

In upholding the transportation of a child one mile outside a school district, the Fifth Circuit Court of Appeals reasoned that transportation "is not arbitrarily limited by the geographic boundaries of the school district so long as it is required for the special circumstances of the handicapped child and is reasonable when all of the facts are considered."[48] In this instance, the only available custodian to care for the child while his mother worked did not live within the school district. The court, finding the transportation request reasonable, noted that the district did not argue that the transportation was a burden, posed substantial additional expense, created an inconvenience for the school district or other students, or disrupted efficiency of bus routes.

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[43] Murphy v. Commonwealth, Dep't of Educ., 504 A.2d 382 (Pa. Commw. Ct. 1986).

[44] Schimmel v. Spillane, 630 F. Supp. 159 (E.D. Va. 1986).

[45] Martin v. School Bd., 348 S.E.2d 857, 864 (Va. Ct. App. 1986), *quoting* Kruelle v. New Castel County School Dist., 642 F.2d 687 (3d Cir. 1981).

[46] Antkowiak v. Ambach, 638 F. Supp. 1564 (W.D.N.Y. 1986).

[47] 20 U.S.C. § 1401(17).

[48] Alamo Heights Indep. School Dist. v. State Bd. of Educ., 790 F.2d 1153, 1160 (5th

A New York federal district court addressed whether a school district was required to provide constant nursing care to enable a severely physically handicapped child to attend public school.[49] The court found that the nature of the child's disability necessitated extensive, specialized care that must be administered by a licensed practical nurse or registered nurse; constant monitoring was needed to protect the child's life. While the court held that the care requested could not be classified as a "medical service" that must be performed by a physician, neither could it be considered merely a school health service. The court concluded that it was more closely related to medical services than school health services, noting that not all health services performed by someone other than a physician are required. Although the court recognized that the child would not be able to attend school without the care requested, the court did not find that it was necessary for the board to provide the services.

An Illinois federal district court rendered its fifth decision in a case involving psychotherapy.[50] In light of the United States Supreme Court's decision in *Burlington*,[51] the parents requested reconsideration of the court's judgment denying them reimbursement for unilaterally secured psychotherapy.[52] While the school district argued that the ruling should be applied on a prospective-only basis, retroactive application was found to be appropriate because it furthered the purpose and effect of the *Burlington* rule. The court concluded that the failure of the school district to provide psychotherapy services denied the handicapped child a free appropriate public education and entitled the parents to reimbursement. The court did not modify its earlier ruling restricting reimbursement of physicians' fees to the cost that would be charged by qualified health care professionals. However, since the school district had agreed to pay for the psychotherapy and had not offered proof that the services could be provided for less, the court ordered full reimbursement of the physician-provided care.

Cir. 1986).

[49] Detsel v. Board of Educ., 637 F. Supp. 1022 (N.D.N.Y. 1986).

[50] Max M. v. Illinois State Bd. of Educ., 629 F. Supp. 1504 (N.D. Ill. 1986).

[51] Burlington School Comm. v. Department of Educ., 105 S. Ct. 1996 (1985). Under *Burlington*, prior expenditures can be recovered if it is later determined that unilateral placement is appropriate and the school district's program is inappropriate.

[52] *See* The Yearbook of School Law 1986 at 128-29.

Ohio parents were unsuccessful in claiming that extracurricular activities were necessary to assist their son to "benefit from special education."[53] The Sixth Circuit Court of Appeals concluded that the EHA does not require a district to provide handicapped students every service that is available to nonhandicapped students; only services from which the student would receive educational benefit must be provided. Since it was determined by the hearing officer that the student was unable to benefit significantly from the activities, the court held that there was no obligation to provide the extracurricular program.

EXTENDED SCHOOL YEAR

It has been clearly established that handicapped children must be provided educational services beyond the regular school year if the lack of services will jeopardize the educational benefits acquired during the year. The issue litigated by the Fifth Circuit Court of Appeals was whether a structured summer program was required for a specific child.[54] The mother of a multiple handicapped child requested extended-year services to lessen the significant regression her son experienced in basic skills and knowledge during the summer. While the school officials maintained that the child did not show significant regression, the appellate court agreed with the district court, hearing officer, and state commissioner of education that the evidence indicated that he would suffer "at least substantial regression," and thereby be entitled to continuous services.

The second case in this area did not raise the question of entitlement to summer programming but rather the issue of who must pay for these services. The Eighth Circuit Appellate Court again ruled in the continuing litigation involving the state of Missouri and the Special School District of St. Louis County.[55] The parents and the Special School District filed this action seeking specific funding from the state for summer programs. The request involved, *inter alia*, exceptional pupil aid for summer programs proportionate to the aid provided during the regular school year, aid for contractual services on a proportionate basis, and an order that the state distribute P.L. 94-142 discretionary funds directly to school districts rather than support state-operated summer programs with these funds. The state defendants maintained that exceptional pupil aid is allocated on a "lump sum" basis for the education of handicapped children and is not limited to 180 days of instruction; summer programming requires a district to spread the aid over twelve months rather than nine months. The court refused to interfere with the state's aid scheme, viewing the plaintiffs' efforts as "an attempt to 'bootstrap' from this court that which they cannot obtain from the Missouri Legislature."[56] The court ordered the state to support summer contractual services, but denied the plaintiffs' request to alter federal requirements regarding P.L. 94-142 discretionary funds. In declining to regulate the state's educational funding decisions, the court noted that there was no evidence indicating that any handicapped child who needed summer services had been denied services. The United States Supreme Court denied review of the case.

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[53] Rettig v. Kent City School Dist., 788 F.2d 328 (6th Cir. 1986), *cert. denied*, 106 S. Ct. 3297 (1986).

[54] Alamo Heights Indep. School Dist. v. State Bd. of Educ., 790 F.2d 1153 (5th Cir. 1986). The Fifth Circuit Appellate Court had held earlier that year-round programming is required if a child will experience substantial regression during the summer months without services, Crawford v. Pittman, 708 F.2d 1028 (5th Cir. 1983).

[55] Yaris v. Special School Dist., 558 F. Supp. 545 (E.D. Mo. 1983), *aff'd*, 728 F.2d 1055 (8th Cir. 1984), *on remand*, 604 F. Supp. 914 (E.D. Mo. 1985), *aff'd*, 780 F.2d 724 (8th Cir. 1986), *cert. denied*, 106 S. Ct. 2896 (1986).

DISCIPLINE

The Ninth Circuit Court of Appeals concurred with several other federal appellate courts that the expulsion of handicapped students is a change in placement triggering the procedural safeguards of the EHA.[57] The Ninth Circuit case involved two California students who were subjected to extended suspensions pending the outcome of expulsion proceedings. In a lengthy opinion, the Ninth Circuit Court of Appeals held that a handicapped student cannot be expelled if the student's misbehavior is a manifestation of his handicapping condition. Furthermore, the court held that an indefinite suspension pending resolution of the expulsion process violates the "stay put" provision of the EHA and cannot be imposed. The court stated that prior to expelling a handicapped student EHA procedures for changing a child's placement must be followed rather than state law regarding expulsion of students. If an IEP team determines that there is *no* relationship between the student's conduct and handicap, the court concluded that the student can be expelled and also suspended during the expulsion proceedings. State officials successfully petitioned the United States Supreme Court to review the appellate court's interpretation of the "stay put" provision. The state has argued that educators must have the authority to remove handicapped students exhibiting disruptive and violent behavior.

Furthermore, the Ninth Circuit Appellate Court noted that handicapped students are not immune from disciplinary measures that do not deprive them of an appropriate education or involve a change in placement. The two- and five-day suspensions permitted under California law were found clearly to be such a permissible measure. While a new provision in the California Education Code permitting twenty-day suspensions (and in special cases thirty days) was not an issue in the case, the court also did not view that deprivation as substantial enough to constitute a violation of the EHA.

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[56] *Id.*, 780 F.2d at 725.

[57] Doe v. Maher, 793 F.2d 1470 (9th Cir. 1986), *cert. granted*, 107 S. Ct. 1284 (1987).

In addition to the above findings, the court held that a state has a duty to develop a policy on the discipline of handicapped students that ensures students' EHA rights. While the state of California had enacted legislation after this case was filed, the court found that several sections of the new law violated the EHA.

REMEDIES

Damages

A New York federal district court's decision agreed with the prevalent view that monetary damages are unavailable under the EHA unless exceptional circumstances exist showing bad faith and egregious failure to comply with the procedural requirements of the Act.[58] However, since the parents had alleged violations that might support a damage award, the court denied the state commissioner's motion to dismiss the case.

Compensatory Services

The Eighth Circuit Court of Appeals[59] found an award of compensatory educational services to be analogous to the granting of retroactive tuition reimbursement upheld by the United States Supreme Court in *Burlington*.[60] In both instances, educational agencies are simply required to pay expenses that should have been incurred earlier. Although the state argued in the Eighth Circuit case that compensatory services were not "retroactive reimbursement," the court ruled that a child should not be denied the services because the parent could not financially provide the services initially. Accordingly, the case was remanded to determine if the state had deprived the child of a free appropriate education.

An Illinois federal district court denied a claim for compensatory remedial education when evidence showed that a child had received an appropriate education.[61]

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58. Gerasimou v. Ambach, 636 F. Supp. 1504 (E.D.N.Y. 1986).
59. Miener v. Missouri, 800 F.2d 749 (8th Cir. 1986).
60. Burlington School Comm. v. Department of Educ., 105 S. Ct. 1996 (1985).
61. Max M. v. Illinois State Bd. of Educ., 629 F. Supp. 1504 (N.D. Ill. 1986).

Attorneys' Fees

Although the EHA did not provide courts the discretion to award attorneys' fees, the Act was amended in 1986 to permit such an award to parents who prevail in any action or proceedings under the Act.[62] The amendment was prompted by the Supreme Court's 1984 decision in ***Smith v. Robinson*** interpreting the EHA as the exclusive means for enforcing handicapped students' rights to a free appropriate education.[63] In *Smith*, the Court concluded that where rights were guaranteed by the EHA, parents could not allege violations under either section 1983 of the Civil Rights Act of 1871 or section 504 of the Rehabilitation Act to secure attorneys' fees. Because Congress feared that the inability of parents to recover costly attorneys' fees might impede enforcement of the EHA, legislation was introduced almost immediately following *Smith* to change the law. After substantial debate, the EHA was amended two years later.

Briefly, the amendment provides that a court may award a parent or guardian reasonable attorneys' fees. Fees are recoverable for any action filed after July 3, 1984 or actions pending at that time, but are limited in several respects: (1) fees must be based on comparable rates in the community for similar legal services, with no bonus or multiplier permitted in calculating the amount;[64] (2) fees may not be awarded for legal services performed after a parent's or guardian's rejection of an education agency's written offer of settlement (made within specified timeframes) if the final relief gained through the due process hearing or court action is not more favorable than the settlement offer; and (3) where the education agency has not prolonged the controversy or violated procedural safeguards of EHA, fees may be reduced if the parent or guardian "unreasonably protracted" the controversy, or the time spent on the action and services was excessive compared to similar proceedings.

Another significant element of the 1986 amendment is the stipulation that the EHA is not to be interpreted as restricting rights or remedies available under the Federal Constitution, section 504 of the Rehabilitation Act, or other civil rights statutes. However, if an action is initiated under other laws seeking relief that also is available under the EHA, procedural requirements of the EHA must be exhausted.

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[62] P.L. 99-372, Handicapped Children's Protection Act of 1986. The law provides that a *court* may award reasonable attorneys' fees. A recent decision of the Supreme Court indicates that parents prevailing in administrative proceedings may have difficulty in recovering fees in legal actions initiated solely to recover fees. See North Carolina Dep't of Transp. v. Crest Street Community Council, 107 S. Ct. 336 (1986).

[63] 468 U.S. 992 (1984).

[64] A bonus or multiplier is sometimes used in unusually difficult cases or cases that involve a significant public issue.

Prior to the passage of the amendment in August 1986, several courts relying on *Smith* rejected fee awards.[65] Following enactment, other courts simply awarded attorneys' fees to prevailing parents in cases that were pending.[66] The Fifth Circuit Court of Appeals remanded a case for further proceedings related to the state defendants' claims of eleventh amendment immunity and sovereign immunity and the handicapped student's request for attorneys' fees for administrative proceedings prior to litigation.[67] Only one case offered an interpretation of any provisions within the new law. A New York school district argued that parents in a class action suit who did not exhaust administrative remedies must be denied attorneys' fees.[68] Since the case involved alleged system-wide violations of the EHA procedures, the federal district court ruled that exhaustion of administrative remedies would have been futile and, therefore, unnecessary. Under the law, attorneys' fees may be awarded to parents who prevail in a legal action. According to the New York court, the parents may prevail through litigation or a settlement.

STATUTE OF LIMITATIONS

Since the EHA does not contain a statute of limitations for filing suits, courts determine which state law provisions are analogous to the federal law. A number of statutes may apply, resulting in courts assessing which ones are most consistent with the EHA policies. New York[69] and West Virginia[70] federal district courts found four months and 120 days, respectively, to be adequate, while a Virginia federal district court held that the most appropriate limitation would be one year.[71] The Sixth Circuit Court of Appeals in a Tennessee case, however, concluded that a statutory limitation of one year was inadequate to encourage parental involvement in educational decision making and held that a three-year limitation was the most consistent with the goals of the EHA.[72]

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65. Alamo Heights Indep. School Dist. v. State Bd. of Educ., 790 F.2d 1153 (5th Cir. 1986); Yaris v. Special School Dist., 780 F.2d 724 (8th Cir. 1986), *cert. denied*, 106 S. Ct. 2896 (1986).

66. Board of Educ. v. Diamond, 808 F.2d 987 (3d Cir. 1986); Taylor v. Board of Educ., 649 F. Supp. 1253 (N.D.N.Y. 1986).

67. Fontenot v. Louisiana Bd. of Elementary and Secondary Educ., 805 F.2d 1222 (5th Cir. 1986).

68. J.G. v. Board of Educ., 648 F. Supp. 1452 (W.D.N.Y. 1986).

69. Gerasimou v. Ambach, 636 F. Supp. 1504 (E.D.N.Y. 1986).

70. Thomas v. Staats, 633 F. Supp. 797 (S.D. W. Va. 1986).

71. Kirchgessner v. Davis, 632 F. Supp. 616 (W.D. Va. 1986).

Janzen v. Knox County Bd. of Educ., 790 F.2d 484 (6th Cir. 1986).

STATE IMMUNITY

Extensive litigation involving the eleventh amendment and principles of sovereign immunity has established that states cannot be sued in federal courts unless they consent through waiver of immunity or Congress expressly abrogates immunity.[73] Following the Supreme Court's 1985 decision holding that the Rehabilitation Act of 1973 did not abolish states' immunity to suit, questions have arisen as to whether states also are immune to suits under the EHA.[74] Both the Seventh Circuit and Ninth Circuit Appellate Courts concluded, in the absence of "unmistakable language" in the law waiving immunity, that Congress did not abrogate states' eleventh amendment immunity in enacting the EHA.[75] The Ninth Circuit Court of Appeals noted that while the EHA imposed specific duties on states, "it nowhere explicitly conditions their right to receive funds on their willingness to waive their sovereign immunity."[76] The New Hampshire Federal District Court, however, followed the precedent established by the First Circuit Court of Appeals in 1985, holding that Congress did effectively abrogate states' immunity for claims under the EHA.[77] The First Circuit Appellate Court held that the EHA was enacted to assure handicapped children equal protection of the law, which is a recognized limitation on eleventh amendment immunity.[78]

STATE LAWS

Again, as in 1985, the Third Circuit Court of Appeals held that state standards for handicapped students exceeding the EHA requirements may be enforced in federal courts.[79] In upholding a residential placement as appropriate for a severely disabled child, the appellate court noted that even if the placement would not have been deemed necessary under the EHA it would have been required by the New Jersey standard that required services "according to how the student can best achieve success in learning."[80] Although the state law had been amended since the case was initiated, the court stated that there was no indication that the more stringent standard had been diminished. The New Hampshire Federal District Court also confirmed that an integral part of determining an appropriate education under the EHA is an examination of state statutes.[81]

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[73] *See* The Yearbook of School Law 1986 at 138-41.

[74] Atascadero State Hosp. v. Scanlon, 105 S. Ct. 3142 (1985).

[75] Doe v. Maher, 793 F.2d 1470 (9th Cir. 1986); Gary v. New Trier High School Dist. No. 203, 796 F.2d 940 (7th Cir. 1986).

[76] Doe, 793 F.2d at 1494.

[77] John H. v. Brunelle, 631 F. Supp. 208 (D.N.H. 1986). *See* David D. v. Dartmouth School Comm., 775 F.2d 411 (1st Cir. 1985), *cert. denied*, 106 S. Ct. 1790 (1986); The Yearbook of School Law 1986 at 140-41.

[78] A Florida federal district court also adhered to the First Circuit ruling. S-1 v. Turlington, 646 F. Supp. 1179 (S.D. Fla. 1986). Without any reference to the EHA or congressional intention, a New York federal district court simply concluded that the eleventh amendment bars suits against states. Gerasimou v. Ambach, 636 F. Supp. 1504 (E.D.N.Y. 1986).

[79] Board of Educ. v. Diamond, 808 F.2d 987 (3d Cir. 1986).

In a state court case, an appellate court interpreted a Michigan law mandating that special education programs maximize the potential of handicapped students.[82] While the court found that this standard had been incorporated into the EHA, it was not seen as imposing unlimited services. The court stated that "[w]hen two competing educational programs which meet the child's requirements are evaluated, the needs of the handicapped child should be balanced with the needs of the state to allocate scarce funds among as many handicapped children as possible."[83] If two programs would enable the child to reach maximum potential, the court noted that it would be reasonable to select the less costly program.

A range of issues was litigated under specific aspects of state handicapped laws or related laws. A Colorado appellate court held that a student's school district of residence was financially responsible for providing special education services, not the department of social services that placed the child with foster parents.[84] In a New Hampshire case, the state high court ruled that a district court has the authority in delinquency proceedings to order a school district to review a handicapped child's educational program but does not have the authority to review the substance of the program and declare it inadequate.[85] Under Pennsylvania law, a commonwealth court concluded that a private state-approved school must serve a handicapped child until the school district or the parent determines that the placement is no longer appropriate.[86] The Connecticut Supreme Court emphasized that there must be "strict adherence" to the state administrative procedures act; however, plaintiffs did not violate the act by failing to name the hearing board in its suit against the state because the board is not an "agency" within the meaning of the law.[87] The application of a New York residency statute was found to violate the equal protection rights of a handicapped student.[88] Although the student had resided in a "family home" in the school district since birth, the district declined to pay for educational services when the student's parents moved out of the state. A Michigan appellate court did not find that a state high school athletic association violated a hearing-impaired student's due process rights by failing to provide an exception to its age rule for participation.[89]

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[80] *Id.* at 991.

[81] John H. v. Brunelle, 631 F. Supp. 208 (D.N.H. 1986).

[82] Nelson v. Southfield Pub. Schools, 384 N.W.2d 423 (Mich. Ct. App. 1986).

[83] *Id.* at 425.

[84] A.C.B. v. Denver Dep't of Social Servs., 725 P.2d 94 (Colo. Ct. App. 1986).

[85] *In re* Todd P., 509 A.2d 140 (N.H. 1986).

[86] Woods Schools v. Commonwealth, Dep't of Educ., 514 A.2d 686 (Pa. Commw. Ct. 1986).

[87] Fairfield Bd. of Educ. v. State Dep't of Educ., 503 A.2d 1147 (Conn. 1986).

DISCRIMINATION UNDER THE REHABILITATION ACT, SECTION 504

The Rehabilitation Act of 1973, section 504, provides that "[n]o otherwise qualified handicapped individual in the United States . . . shall, solely by reasons of his handicap, be excluded from participation in, or be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance . . . ." Section 504 is broader than the EHA and applies to educational and noneducational agencies receiving federal assistance. It prohibits recipients of federal funds from discriminating against handicapped individuals in educational programs and employment.

Students

As noted, the Supreme Court in *Smith* severely limited the application of section 504 to handicapped students.[90] Until the Handicapped Children's Protection Act authorizing the award of attorneys' fees was passed in 1986, courts continued to dismiss most claims raised under section 504.[91] Following enactment of the attorneys' fees law which contained a provision eliminating the *Smith* restriction on the use of section 504, courts have disagreed as to whether section 504 should be applied retroactively. The Third Circuit Court of Appeals relied on the long standing principle that appellate courts are required to apply enacted laws to pending cases.[92] The court specifically rejected the argument that silence with respect to retroactive application of section 504 indicated that Congress intended only prospective application. Distinguishing the retroactive provision of the attorneys' fees section from the silence regarding section 504, the court noted that retroactive designation is necessary if a new law is to be applied to pending cases, whereas clarification of a misinterpretation of congressional intention with respect to an existing law does not require such an indication. In contrast to this position, a New York federal district court refused to recognize retroactive effect of section 504, noting that Congress did not specifically provide for retroactive application.[93]

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[88] Catlin v. Ambach, 644 F. Supp. 161 (N.D.N.Y. 1986).

[89] Nichols v. Farmington Pub. Schools, 389 N.W.2d 480 (Mich. Ct. App. 1986).

[90] Smith v. Robinson, 468 U.S. 992 (1984). *See* text with note 63, *supra.*

[91] *See* Miener v. Missouri, 800 F.2d 749 (8th Cir. 1986); Kirchgessner v. Davis, 632 F. Supp. 616 (W.D. Va. 1986). *But see* S-1 v. Turlington, 646 F. Supp. 1179 (S.D. Fla. 1986).

[92] Board of Educ. v. Diamond, 808 F.2d 987 (3d Cir. 1986).

As noted above, section 504 is applicable to institutions only if they receive federal financial assistance. However, the question of whether program-specific funding is required to file a section 504 claim continues to be debated. The Sixth Circuit Court of Appeals, relying on the Supreme Court's interpretation of title IX, held that institution-wide financial assistance is inadequate to initiate a case; an individual must claim involvement or exclusion in a program that receives assistance.[94] The handicapped student in this case was denied relief because he was never involved in, nor sought to be involved in, a specific program receiving federal assistance.

Widespread concern regarding AIDS, AIDS-Related Complex, and HTLV-III antibody has resulted in the promulgation of policies and guidelines for the admission of infected students to public schools. Most of these guidelines have stated that students with AIDS should not be excluded from school unless exceptional circumstances exist. In 1986, two New York local community school boards challenged education and health officials' admission of an unidentified child with AIDS.[95] New York City's AIDS policy provides that children with AIDS will not be automatically excluded from public schools but will be reviewed on a case-by-case basis to determine whether their condition will permit them to attend regular classes. In responding to the challenge to the nonexclusion rule, a state supreme court stated that automatic exclusion of these children would violate the Rehabilitation Act. A handicapped person is defined in the Act as a person with a physical or mental impairment that substantially limits one or more of the major life activities or a person regarded as having such an impairment. The court noted that since a physical disorder includes impairment to the lymphatic system such as caused by HTLV-III, an individual with AIDS has a physical impairment. Additionally, an individual excluded from school because of AIDS would be regarded as having an impairment. Furthermore, the court stated that exclusion of only identified AIDS carriers as proposed by the school boards without excluding children with AIDS-

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[93] Taylor v. Board of Educ., 649 F. Supp. 1253 (N.D.N.Y. 1986).

[94] Gallagher v. Pontiac School Dist., 807 F.2d 75 (6th Cir. 1986).

[95] District 27 Community School Bd. v. Board of Educ., 502 N.Y.S.2d 325 (Sup. Ct. 1986).

Related Complex or those infected with the virus would be discriminatory under section 504 and a denial of equal protection of the laws.[96]

The Eighth Circuit Court of Appeals, in a higher education case, held that the disabilities of a doctoral student who was dismissed for academic reasons were not adequate to support a claim under the Rehabilitation Act because she was not "otherwise qualified" for the program.[97] The student identified her handicap as a "test-taking phobia, a neurotic dependency upon her professors and an inability to communicate with her professors due to her right-brain dominance and their left-brain dominance."[98]

In a Seventh Circuit case, a handicapped university student, who had been unsuccessful in an appeal to the United States Department of Education's Office of Civil Rights, sued the Secretary of Education seeking damages and an injunction to compel the Secretary to investigate his complaint.[99] The appellate court acknowledged the private right of action against the recipient of federal funds accused of discrimination[100] but held that there is no provision for an individual to initiate action against an administrative adjudicator.

Employees

The cases reported in this section interpreting the Rehabilitation Act involve public employees in general rather than school personnel. Issues litigated include: What is an impairment under the Act? What constitutes "reasonable accommodation" for an otherwise qualified handicapped person? Does section 504 preclude additional claims under section 1983?

Handicapped Persons. To invoke the protections of the Rehabilitation Act an employee must first establish that he is "handicapped" within the meaning of the Act. The Act defines a handicapped individual as "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment."[101] In reviewing claims, courts first determine if there is an impairment, and then assess whether it substantially limits a major life activity.

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[96] New Jersey's AIDS policy was declared void under state law for failure of the commissioner of education to follow provisions of the state administrative procedures law. Board of Educ. v. Cooperman, 507 A.2d 253 (N.J. Super. Ct. App. Div. 1986).

[97] Schuler v. University of Minn., 788 F.2d 510 (8th Cir. 1986).

[98] *Id.* at 516 n.8.

[99] Salvador v. Bennett, 800 F.2d 97 (7th Cir. 1986).

[100] *See* Moore v. Warwick Pub. School Dist. No. 29, 794 F.2d 322 (8th Cir. 1986).

[101] 29 U.S.C. § 706(7)(B).

The Fifth Circuit Court of Appeals reasoned, in a case involving a letter carrier, that being left-handed was not an impairment, but rather a physical characteristic.[102] It could not be viewed as a chronic illness, a deformity, a mental disability, or a condition affecting the individual's health. In a Fourth Circuit case, the appellate court held that a utility systems repairer's acrophobia did not constitute a handicap.[103] Rather than arguing that the disability substantially limited his major life activities, the employee claimed that his fear of heights had never been a problem in his life or previous jobs.[104] The court concluded that the employer did not perceive the individual's impairment as foreclosing or substantially limiting employability but found him unable to perform the full range of duties required in the position. The court emphasized that an employee who fails to satisfy a specific job demand does not become a handicapped person.

Drug or alcohol abusers whose current use interferes with job performance or poses a threat to property or the safety of others are not handicapped individuals under the Rehabilitation Act. A New York City police officer argued that his dismissal for heroin addiction was impermissible discrimination on the basis of his handicap.[105] The Second Circuit Appellate Court rejected his claim, stating that his drug use rendered him "unfit for police work."[106]

The District of Columbia Federal District Court held that an employee who was not rehired for a position after a reduction in force because he was a transvestite had stated a claim under the Rehabilitation Act.[107] The complaint by the employee, alleging that the employer eliminated a position he sought because officials perceived his transvestism as a handicap, was sufficient to support a claim.

Reasonable Accommodation. A qualified handicapped person is one who can perform the essential functions of a position with "reasonable accommodation." A Pennsylvania federal district court held that the inability of a postal worker to lift heavy objects was a surmountable barrier which could be accommodated.[108] The employee was able to perform many other essential aspects of the position and could perform this function with accommodations, such as the use of equipment.

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[102] de la Torres v. Bolger, 781 F.2d 1134 (5th Cir. 1986).

[103] Forrisi v. Bowen, 794 F.2d 931 (4th Cir. 1986).

[104] Under a state antidiscrimination statute, a Pennsylvania court held that a personality disorder which caused an employee to be chronically late was not a handicap in that it did not substantially interfere with any major life activities. School Dist. v. Friedman, 507 A.2d 882 (Pa. Commw. Ct. 1986).

[105] Heron v. McGuire, 803 F.2d 67 (2d Cir. 1986).

[106] While the Ohio Supreme Court found that drug addiction and alcoholism are handicaps under state law, the court also stated that such abuse can be the basis for dismissal if it affects job performance. In the case before the court, an employer was held to have discriminated against an individual who requested a leave of absence for treatment of a chemical dependency; no problems had been noted in the employee's job performance, and the employer had granted disability leave for other employees. Hazlett v. Martin Chevrolet, Inc., 496 N.E.2d 478 (Ohio 1986).

[107] Blackwell v. United States Dep't of Treasury, 639 F. Supp. 289 (D.D.C. 1986)

The question addressed by an Illinois federal district court was whether reasonable accommodation includes reassignment to other positions.[109] According to federal regulations, a qualified handicapped person is one who with reasonable accommodation "can perform the essential functions of the *position in question*."[110] The court interpreted "position in question" to be the position that is denied to a handicapped individual; it does not include other positions the individual could have held.

Other Issues. In a Florida case, the defendants argued that an employee could not bring a handicap discrimination claim under both section 504 and section 1983.[111] Relying on *Smith v. Robinson,* they asserted that the filing of a section 504 suit precluded relief under section 1983 in the same manner as the EHA barred relief under section 504 and section 1983.[112] Rejecting the defendants position, the court concluded that the ruling in *Smith* did not define the relationship between section 504 and section 1983, and further noted that several federal appellate courts had permitted claims under both laws.

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[108] Trimble v. Carlin, 633 F. Supp. 367 (E.D. Pa. 1986).

[109] Dancy v. Kline, 639 F. Supp. 1076 (N.D. Ill. 1986).

[110] *Id.* at 1078, *citing* 29 C.F.R. § 1613.702(f).

[111] Shuttleworth v. Broward County, 639 F. Supp. 654 (S.D. Fla. 1986).

[112] 468 U.S. 992 (1984).

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TORTS

William J. Evans, Jr.

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INTRODUCTION

The purpose of tort law is to offer remedies to individuals for harm which resulted from the unreasonable conduct of others. A tort is a civil wrong, other than breach of contract, for which a court provides relief in the form of damages. State laws provide the basis for most actions, which are predicated on the principal that individuals are responsible for the consequences of their conduct.[1]

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[1] *See generally*, W. Prosser, Law of Torts (4th ed. 1971).

The major categories into which tort actions can be grouped are: negligence, which involves conduct that falls below an acceptable standard of care resulting in injury; intentional torts, where such actions as assault, battery, defamation, trespass, and false imprisonment are committed with the desire to do harm; and strict liability, where an injury results from the creation of an unusual hazard.[2]

This chapter will examine those cases reported during 1986 which involve tort claims within the school context. Included are cases involving school officials, school employees, and students.

NEGLIGENCE

Negligence is the most common tort alleged to have been committed by school personnel. Such a charge can result when an improper act, or a failure to act, causes injury to another person. For negligence to exist, the person causing the injury must fail to exercise a standard of care commensurate with the risks involved and the duty owed to the injured party.

There also must be a causal relationship between the alleged negligent conduct and the injury sustained. In negligence cases, questions of law are determined by judges, while questions of fact are decided by juries.

Student Injuries

Schools are responsible for maintaining a safe and healthy environment in which learning can take place. The following cases illustrate how injuries to students, while they were in the school setting, resulted in a variety of lawsuits with varying outcomes.

School Settings During School Hours. Two cases in Illinois involved students who were injured during physical education classes. A former student brought an action against the school district for spinal injuries suffered as a result of a trampoline accident.[3] The circuit court found for the school district and the plaintiff appealed. In affirming the lower court decision, the appellate court of Illinois examined three counts of the complaint: (1) that the school district was strictly liable for the consequences of exposing pupils to an "abnormally dangerous instrumentality," (2) that the school district was negligent in the selection and use of an "abnormally dangerous apparatus," and (3) that the school district was negligent in the hiring and supervision of teachers.

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[2] See M. McCarthy & N.H. Cambron-McCabe, Public School Law (2nd ed. 1987).

[3] Fallon v. Indian Trail School, 500 N.E.2d 101 (Ill. App. Ct. 1986).

In agreeing that the first two counts were properly dismissed, the court concluded that "although its negligent use can be the basis for liability, neither the trampoline itself nor its ordinary use is abnormally dangerous or ultrahazardous."[4] On the third count, the court found the questions of whether the school district failed to investigate, and whether the teachers were unqualified, were insufficient to state a cause for negligent hiring.

A student who was injured in a wiffleball game brought an action against the teacher, high school, and school district.[5] When the circuit court dismissed the charges of willful and wanton misconduct and negligence, the student appealed. The court explained the controlling standard:

> [A] willful or wanton injury must have been intentional or the act must have been committed under circumstances exhibiting a reckless disregard for the safety of others, such as failure, after knowledge of impending danger, to exercise ordinary care to prevent it or a failure to discover the danger through recklessness, or carelessness when it could have been discovered by ordinary care.[6]

As the complaint did not allege the defendants intentionally caused the plaintiff's injury, the remaining issue was whether a reckless disregard for the plaintiff's safety was established. In affirming the lower court, the holding was that sufficient facts were not alleged upon which to base willful and wanton misconduct. The plaintiff did not show what specific circumstances made the activity more dangerous than other athletic activities normally conducted in the gymnasium, or why the teacher should have known of the impending danger.

In a third case involving a physical education class, a twelve year old Louisiana student was injured while engaged in a makeshift football game.[7] The teacher had left the class under the supervision of a teacher-aide while she attended a meeting with the principal. The injured student broke his leg resulting in its shortening. The trial court absolved the teacher and aide of responsibility, but in granting the student an award of $200,000, found the school district negligent for improper supervision.

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[4] *Id.* at 481.

[5] Tijerina v. Evans, 501 N.E.2d 995 (Ill. App. Ct. 1986).

[6] *Id.* at 680.

[7] Marcantel v. Allen Parish School Bd., 490 So. 2d 1162 (La. Ct. App. 1986). *See also* Aleroff v. Casagrande, 504 N.Y.S.2d 719 (App. Div. 1986) (jury verdict of negligence was upheld where a student was injured by an eraser thrown while the teacher was out of the room and the teacher was aware of rowdy behavior of students in his absence); Emery v. Chapman, 495 So. 2d 371 (La. Ct. App. 1986) (case where a girl was injured by a student with a propensity toward violence of which the school principal and school board were aware was remanded for trial).

The Court of Appeals of Louisiana affirmed the decision with the modification that the teacher was 5% at fault. Testimony showed she had returned before the accident took place. The award was allowed to stand, as the court found a causal relationship between the injury and the shortening of the student's leg.

A sixth grade Illinois student sustained a head injury while playing kickball during a supervised recess period.[8] For approximately an hour and a half, the student was seated on a bench near the principal's office. During that time, the child's mother was contacted and she instructed that her child be taken to the hospital. After several calls to a police emergency number failed to bring an ambulance, a call was made to a hospital located directly across the street from the school and an ambulance was sent immediately. In the intervening ninety minutes, the child's condition had deteriorated markedly. Following an operation, the student required a cane to walk, had weakness on his left side, and experienced headaches. The doctor who performed the operation testified that had the child been brought in an hour earlier, he would merely have had a seven to ten day hospital stay. The appellate court affirmed the decision that the school staff had acted willfully and wantonly in failing to obtain prompt medical attention for the injured student. In particular, the court cited that the hospital was located directly across the street, and the mother had given specific orders to take her child there.

A student in a Kansas high school, who was injured during a woodworking class, brought an action against the teacher and the school board.[9] The student cut his fingers while working with a table saw from which the teacher had removed a safety guard while changing the blade. In affirming the district court decision, the Supreme Court of Kansas noted that the student had previously taken a beginning woodworking class, reviewed instructions on safe use of the saw, and twice passed a test on its use. While there was some evidence that the instruction and supervision were not totally adequate, a divided court let stand the trial court's decision against the student.

There were two cases which involved students with specific physical disabilities. In Nebraska, an eleven year old student who suffered from a congenital deformity of the spinal column, fractured his leg while participating in a physical therapy program administered at his elementary school.[10] An action which was brought against the school district was dismissed by the district court with a directed verdict. On appeal, the Supreme Court of Nebraska explained that "only where reasonable minds can draw but one conclusion from the evidence presented is a directed verdict an appropriate method of terminating litigation."[11] Applying that principle, the court affirmed the decision holding the school district could not be held liable for the negligence of a state-employed therapist. That therapist had directed a school district employee to assist in the student's therapy, but since the employee's actions were not found to have been the proximate cause of the injury, the school district could not be held liable for his actions. Finally, the orders given by the therapist to the school employee were not found to be so obviously improper that the employee should have refused to carry them out, or even to make further inquiry.

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[8] Barth v. Board of Educ., 490 N.E.2d 77 (Ill. App. Ct. 1986).

[9] Paulson v. Unified School Dist. No. 368, 717 P.2d 1051 (Kan. 1986).

[10] Greening v. School Dist., 393 N.W.2d 51 (Neb. 1986).

In New York, parents of a young child alleged that she was injured as a result of the school district's failure to examine her for scoliosis.[12] The supreme court, appellate division affirmed the local court decision in favor of the district, finding that the state legislature "did not intend to create a private cause of action based upon a school district's failure to examine students for scoliosis."[13]

In a case involving the administration of corporal punishment, a Louisiana father sued a teacher and the school's liability insurer for damages resulting from injury to his son.[14] The district court rejected the claim, and the decision was upheld by the court of appeals. The paddling was found to be reasonable in degree, rendered for disciplinary reasons, and imposed in accordance with school rules.

En route to and from School. There were two cases in which actions for the injury of students being transported to or from school were successful. The Supreme Court of Kentucky affirmed a court of appeals decision involving a wrongful death action for a student who was killed in a school bus accident.[15] The court recognized that a statute creating a right of recovery for surviving parents for the loss of a child's affection was a new and separate remedy, rather than a method of enhancing damages in a wrongful death suit.

In Pennsylvania, a six year old was injured when the van in which she was riding stopped suddenly, throwing her forward. Her parents brought an action against the school district and the owner of the van.

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[11] *Id.* at 54.

[12] Grindle v. Port Jervis Cent. School Dist., 500 N.Y.S.2d 314 (App. Div. 1986).

[13] *Id.* at 315. *See also* Henry v. State Dep't of Health and Human Resources, 482 So. 2d 962 (La. Ct. App. 1986) (child's father failed to show that negligence by a state school caused a quadriplegic and spastic cerebral palsy patient to break his leg).

[14] Harrell v. Daniels, 499 So. 2d 482 (La. Ct. App. 1986).

[15] Department of Educ. v. Blevins, Ky., 707 S.W.2d 782 (Ky. 1986).

After the claim against the district was dismissed, a jury trial resulted in a verdict for the defendants. That decision was set aside by the court of common pleas. On appeal, the Supreme Court of Pennsylvania affirmed the decision holding that the jury should have been allowed to consider evidence that the operator of the van had failed to use available seatbelts to restrain the child.[16]

In New York, there was a transportation action where a student was not successful. Suit was brought after the student was hurt when the bus in which he was riding was involved in an accident with a sanitation truck.[17] A state supreme court (trial court) recognized that the bus was being operated in a normal manner, and held that such operation is not inherently dangerous work. Therefore, in finding for the school district, the rule that liability cannot be avoided by employing an independent contractor to perform such work, was not applicable to the school board.

The death of a twelve year old student, struck and killed by an automobile at a school bus stop, was the subject of an action against a school district.[18] The District Court of Appeal of Florida found that the district was liable by locating the bus stop and not sufficiently monitoring the incidents of near misses when vehicles left the roadway nearly hitting waiting children. The mere absence of prior accidents or death were seen as fortuitous circumstances for which the board could claim no credit.

The parents of a five year old kindergarten student who was hit by an automobile while walking home, brought an action contending that by placing a crossing guard at an intersection during the afternoon, the school district assumed a duty to do so in the morning when kindergarten students were walking home.[19] The Superior Court of Colorado, in finding for the school district, explained that in order to recover under an assumed duty theory,

> [a] plaintiff must first show that the defendant, either through its affirmative acts or through a promise to act, undertook a service that was reasonably calculated to prevent the type of harm that befell the plaintiff. Second, a plaintiff must also show either that he relied on the defendant to perform the service or that defendants' undertaking increased plaintiff's risk.[20]

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[16] McKee v. Southeast Delco School Dist., 512 A.2d 28 (Pa. Super. Ct. 1986). *See also* Throop v. Johnson, 720 S.W.2d 30 (Mo. Ct. App. 1986) (an injured motorist was granted a new trial in an action against a school bus driver).

[17] Settles v. Incorporated Village of Freeport, 503 N.Y.S.2d 945 (Sup. Ct. 1986).

[18] Duval County School Bd. v. Dutko, 483 So. 2d 492 (Fla. Dist. Ct. App. 1986).

[19] Jefferson County School Dist. R-1 v. Gilbert, 725 P.2d 774 (Colo. 1986).

[20] *Id.* at 776.

Having the guards present when several times as many children were released in the afternoon was not found to make it negligent when guards were not provided when a single grade was dismissed in the morning.

In Washington, a seven year old student was fatally injured when he was struck by an automobile while crossing a street on his way home from school. Wrongful death actions were brought against the school district and the driver of the vehicle. The district and the driver cross-claimed against each other and later counter-claimed against the parents for contribution. The court of appeals upheld the part of the trial court's decision that the parental-immunity doctrine was not abrogated on the basis that the cause of action was for wrongful death. However, it also reversed the trial court by finding the school's negligence, in failing to implement and supervise students in the use of school buses, not to have been a proximate cause of the child's death.[21]

A six year old California first grade student was struck and injured by an automobile as she walked home. The accident occurred near the school at a site frequently used by school children as a "short cut." In the suit brought on behalf of the child, the state court of appeal examined two questions. First, did the school district have potential tort liability for failure to remedy a potential dangerous condition? Second, did the district have potential liability for failure to provide an adequate course of safety education, or to cause a crossing guard to be employed at the site of the accident? In denying the first claim, the court stressed that the school district neither owned nor controlled the property alleged to be in a dangerous condition. Similarly, on the second claim, the court found that the defendant's liability could only have been based on an alleged failure to exercise due care in supervision on school premises.[22]

Also in California, a student brought an action against her school for injuries she sustained in an automobile accident.[23] Her high school had let out early, urging students to attend a school-sponsored parade scheduled to take place approximately one and a half miles away. No transportation was provided to the parade location, and there was no supervision of students walking to the site. In addition, buses were not scheduled to be available to take students home until their usual time. The plaintiff accepted a ride to the parade site from another student, and was seriously injured when the vehicle was involved in an accident. Although the trial court entered a judgment for the student, she appealed claiming that evidence of medical expenses incurred on her behalf were excluded. The court of appeal held that the cause of action to recover medical expenses does not belong exclusively to the student's parents, but to both the parents and the minor. Therefore, the tort claim was not deficient.

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[21] Chhuth v. George, 719 P.2d 562 (Wash. Ct. App. 1986).

[22] Marcia S. v. Gibbel, 223 Cal. Rptr. 206 (Dist. Ct. App. 1986).

[23] White v. Moreno Valley Unified School Dist., 226 Cal. Rptr. 742 (Dist. Ct. App. 1986). *See also* Cloman v. Monroe City School Bd., 490 So. 2d 691 (La. Ct. App. 1986) (motorist was successful in an action for damages from emotional trauma caused when she struck and killed a handicapped student).

School Buildings and Grounds. In a case emanating from Oregon, a student brought an action to recover for physical and emotional injuries after being assaulted and raped on school grounds before school began.[24] She claimed the school district was negligent in failing to provide adequate security, and in failing to warn students of a prior similar incident. After the circuit court gave a directed verdict for the district, the student appealed. In reversing the lower court opinion, the Court of Appeals of Oregon concluded that the similarity of the incident to the earlier one made the attack on the student reasonably foreseeable.

A California student who was stabbed by a nonstudent while on school grounds, brought an action against the school board.[25] The state court of appeal found that the special relationship which exists between student and school district imposes a duty on the district to protect the student. However, in finding for the school board, the court explained that no physical defects or conditions of the campus which would increase the risk of crime were alleged. In addition, the allegation that other such acts occurred on the campus gave notice, but did not place the situation within the legal parameters of a dangerous condition which would state a cause of action.

When a Massachusetts student pushed at a swinging entrance door to his school's auditorium, he put his hand through a glass panel. The action caused permanent injury to the hand. The student brought suit against the city of Boston for failing to glaze an interior door with reinforced glass.[26] The superior court rejected the position that the city had no duty to install safety glass on the door and ruled for the plaintiff. That decision was affirmed by the Appeals Court of Massachusetts which explained that the plaintiff had presented evidence,

> that there existed a recognizable hazard; a hazard that existed in a setting where the hazard was likely to have consequences (a swinging door to a place of assembly used by teenagers

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[24] Fazzolari v. Portland School Dist. No. 1J, 717 P.2d 1210 (Or. Ct. App. 1986). *See also* Alvarez v. Dade County School Bd., 482 So. 2d 542 (Fla. Dist. Ct. App. 1986) (a directed verdict was deemed inappropriate where there was conflicting testimony as to what time school authorities provided adult supervision on school premises and as to what time an accident occurred).

[25] Rodriguez v. Inglewood Unified School Dist., 230 Cal. Rptr. 823 (Dist. Ct. App. 1986).

[26] Johnson v. City of Boston, 490 N.E.2d 1204 (Mass. App. Ct. 1986).

> who were likely to be high spirited, distracted, or both); and that relatively simple and inexpensive means existed to reduce the hazard.[27]

School-related Activities. While participating in an interscholastic football game, a black Massachusetts student was shot and paralyzed for life. The shooting was allegedly perpetrated by "unknown white persons." The student and his family filed suit alleging that the city of Boston negligently failed to protect the student from racial violence which they knew or should have known was likely at such an interracial event. It also was charged that the city's negligence amounted to deprivation of liberty without due process, a violation of the fourteenth amendment. The district court dismissed the complaint for failure to state a claim. While expressing sympathy for the student and his family, the court of appeals affirmed that decision.

It had not been alleged that the city had knowledge of the impending attack, nor that there had been racial violence at previous school athletic events. Moreover, it was not asserted that the city provided no security at the game. Therefore, the allegations involved common law negligence, which by itself does not state a claim for deprivation of liberty without due process of law.[28]

A Florida high school student, who had stayed after school to have his picture taken with the junior varsity football team, was beaten by three students while waiting in a cafeteria area. In an action against the school, he contended that by failing to supervise the cafeteria area the school had breached its duty to provide adequate security for its students. The circuit court entered judgment upon a jury verdict holding the school officials responsible for the student's injuries. The District Court of Appeal of Florida upheld the verdict awarding $30,000 for the student.[29] The court found a duty for the school to provide supervision and protection "in a centrally located part of the school building which students regularly occupy with the school's consent and knowledge during the hours immediately after the end of classes."[30] In addition, the court rejected the contention that fighting was not foreseeable when a small number of students are waiting in an area to be picked up from school.

The parents of a thirteen year old student who was struck by an automobile while attempting to cross the street brought suit against two teachers.[31] At the time of the injury, the student was on a field trip and was crossing the street to play in a park with other students. The circuit court found the teachers negligent for allowing the student to cross the street unsupervised. The Court of Appeals of Tennessee reversed the decision on the basis that the standard of care is that which is reasonable and ordinary under the circumstances. There was nothing in the record to suggest that the student would not use ordinary care for his safety, or that the street was unreasonably dangerous to cross. Therefore, the teachers did not have a duty to personally escort the student.

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[27] *Id.* at 1206.
[28] Williams v. City of Boston, 784 F.2d 430 (1st Cir. 1986).
[29] Broward County School Bd. v. Ruiz, 493 So. 2d 474 (Fla. Dist. Ct. App. 1986).
[30] *Id.* at 477.
[31] King v. Kartanson, 720 S.W.2d 65 (Tenn. Ct. App. 1986).

A Louisiana high school student, who was attending a school-sponsored dance, became intoxicated despite rules forbidding such behavior. Toward the end of the evening, in the school's parking lot, the student became sick and was told by two other students to refrain from sitting on their cars. When one of the cars was moved a short while later, the plaintiff, who was lying under the right side of the car, was run over and severely injured. Actions were brought against the two students in the parking lot, their parents and automobile insurers, the school board, its insurer, and the insurer of the sheriff. A jury trial was conducted for all parties except the school board, which was decided by the trial judge. The jury found no liability on the part of the students, parents, or their insurers, but did find the plaintiff guilty of contributory negligence. The jury also found the insurer for the school board and the sheriff liable, as their insureds had the last clear chance to avoid the accident. The trial judge found no liability on the part of the school board despite the fact that its insurer was held liable by the jury.

The Court of Appeal of Louisiana reversed that part of the decision holding the sheriff liable. Although two deputies from the sheriff's office were assigned to the dance the night of the accident, the court explained that the duty of the police is to the general public and not to the individual. The officers had earlier patrolled the lot, and there was no evidence that they had seen the plaintiff in an intoxicated state. The plaintiff, therefore, was unable to prove that the defendant owed him a special duty outside that owed to the general public.[32]

In New York, a fourteen year old asthmatic student complained to the school nurse that she was feeling ill, but was denied treatment and directed back to class. Instead, the girl chose to leave the school, apparently without permission. After arriving home, and while her mother was telephoning an ambulance, the girl fell from an apartment window. In court, it was asserted that the school negligently failed to supervise and care for the student. That claim was denied with the holding that the child had passed out of the authority of the school. And, while the school bore no further duty to protect her, even if a duty was owed the school's conduct was not seen as the proximate cause of the student's injuries.[33]

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[32] Lowe v. Patterson, 492 So. 2d 110 (La. Ct. App. 1986).

NEGLIGENCE DEFENSES

Immunity

Traditionally, the most commonly used defense has been governmental immunity. One premise is that school districts lack the legal ability to pay tort claims since public funds can only be used for statutorily prescribed purposes.[34] Increasingly, legislative and judicial inroads have restricted the use of this defense. Still, in the thirteen cases involving an immunity defense, school districts were found liable in only three.

Common Law (Governmental Immunity). Four cases involving governmental immunity emanated from Pennsylvania. In one, a member of a cheerleading squad was injured during an after school practice session held on school grounds. The incident occurred during an unsupervised practice which had been scheduled by a faculty advisor. The student's action against the school district alleged negligent supervision, a claim denied by the court of common pleas. The appellant sought exception to the Tort Claim Act as it relates to the care, custody, and control of real property. In affirming the lower court decision, the commonwealth court explained that immunity is not waived just because the incident occurred on government owned property. Furthermore, "it would be a total distortion to allow the supervision to fall within the care, custody, and control of real property."[35]

A mother filed a wrongful death complaint after her son had sustained a fatal knife wound in a high school hallway.[36] The common pleas court granted a motion for judgment in favor of the school district. On appeal, the mother reasoned that the school district was liable for failing to provide police and security protection, negligent medical care, and ignoring warnings that her son's life was in danger. The commonwealth

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33. Griffith v. City of New York, 507 N.Y.S.2d 445 (App. Div. 1986).

34. *See* K. Alexander, R. Corns, & W. McCann, Public School Law: Cases and Materials (1969), at 336.

35. Mes[illegible]na v. Blairsville-Saltsburg School Dist., 503 A.2d 89 (Pa. Commw. Ct. 1986). *See also* Yount v. Board of Educ., 712 S.W.2d 455 (Mo. Ct. App. 1986) (court declined to give retrospective effect to a statutory waiver of sovereign immunity).

36. Gilbert v. School Dist. of Philadelphia, 511 A.2d 258 (Pa. Commw. Ct. 1986). *See also* Merritt v. Board of Educ., 513 A.2d 504 (Pa. Commw. Ct. 1986) (doctrine of sovereign immunity applied in action against school principal and board of education for rape of mentally retarded minor in a school ladies room—lack of proper supervision had been alleged).

court, in rejecting these arguments and affirming the lower court decision, held that the plaintiff failed to produce any facts which would deprive the school district of immunity. In response to the plaintiff's attempt to amend her complaint to name specific individuals, the court found that the statute of limitations had run out in regard to bringing a new and distinct party to the action.[37]

After a Pennsylvania student was killed by an automobile as he attempted to cross an intersection in order to board a school bus, his parents brought a negligence action against the city and board of education.[38] The sole issue was the possible governmental immunity of the defendants. In affirming the lower court's decision, the commonwealth court found both the city and the school board of education immune from liability. Although the legislative intent of a specific section of the Pennsylvania Vehicle Code was to protect students, the clear language of the statute which protected the defendants "could not be disregarded under the pretext of pursuing its spirit."[39]

The plaintiff parents of a high school student, who was killed while joy riding in a car set to be worked on by the school's auto shop class, sought exception to the district's governmental immunity. In affirming the lower court decision, the Commonwealth Court of Pennsylvania determined that the alleged negligent conduct did not fall under the vehicle, real property, or proprietary exceptions to governmental immunity.[40] The vehicle exception did not apply since it was undisputed that, at the time of the accident, the car in question was driven by a student and not a government employee or agent. The real property exception did not apply, the court explained, because the alleged negligence consisted of a failure to adequately supervise students. Finally, the appellants argued that because the school charged money for the services provided in the auto shop, it was not immune from actions arising directly from that activity. The court also rejected this argument citing statutory provisions controlling the situation at hand.

In Texas, a woman was injured when the bleachers at a middle school basketball game collapsed. She contended that the basketball game was proprietary in nature, and therefore her suit for damages fell outside the district's governmental immunity. The trial court found for the school district, and was affirmed by the court of appeals. The appellate court explained that "scholastic athletic programs, even though performed within the territorial limits of the district, are governmental in nature."[41] The court saw the purpose for creating a school district as purely governmental, and therefore its actions to be those of an agent of the state. In answering the appellate's claim that she was not a student or employee of the school district but instead an admission paying spectator at the school sponsored game, the court said:

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[37] *Id.* at 260. *See also* Mapp v. Drake, 344 S.E.2d 682 (Ga. Ct. App. 1986).

[38] Bryson v. Solomon, 510 A.2d 377 (Pa. Commw. Ct. 1986).

[39] *Id.* at 381.

[40] Davies v. Barnes, 503 A.2d 93 (Pa. Commw. Ct. 1986).

> Whether a particular school sponsored activity is governmental in nature is not determined by the person involved or injured as a result of such activity, but by the function itself. The rule of governmental immunity for a school or school district exists for the benefit of the whole and its school system, and the purpose of the rule would be defeated if its application was made dependent on the status of the injured plaintiff.[42]

A personal injury action was brought on behalf of a Michigan junior high school student who allegedly had been assaulted by his teacher while on off-school premises.[43] The plaintiff appealed a circuit court summary decision dismissing charges against the teacher's principal and superintendent. The Court of Appeals of Michigan upheld the lower court decision explaining that the plaintiff was unable to establish malicious or intentional unlawful behavior on the part of the defendants. Therefore, the doctrine of governmental immunity had been appropriately applied. In addition, the court found there was no reasonable cause to believe that the defendants were aware of the teacher's actions.

In the following three cases the governmental immunity defense was specifically denied. In a case from Michigan, a middle school student drowned when he failed to resurface after diving into a pool during swimming class.[44] The boy's father filed a wrongful death action against the swimming class instructors and the school's administrators. The circuit court found the acts of the defendants discretionary and therefore immune from tort liability. The court of appeals affirmed that portion of the decision which recognized that the methods of rescue and attempted resuscitation employed by the instructors were discretionary and cloaked with immunity. However, with respect to the administrator's alleged failure to properly supervise both the children and the instructors' decision-making as it relates to instruction, the court reversed the holding of immunity from tort liability.

A Pennsylvania student, who had been injured going over a vaulting horse in a district gymnasium, brought suit against the school district.[45]

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[41] Gravely v. Lewisville Indep. School Dist., 701 S.W.2d 956, 957 (Tex. Civ. App. 1986).

[42] *Id.* at 958.

[43] Rosencrans v. Kingon, 397 N.W.2d 317 (Mich. Ct. App. 1986).

[44] Webber v. Yeo, 383 N.W.2d 230 (Mich. Ct. App. 1986).

[45] Singer v. School Dist. of Philadelphia, 513 A.2d 1108 (Pa. Commw. Ct. 1986).

The student broke his elbow when he fell and missed a mat and landed on a hardwood floor. The trial court found for the district citing the doctrine of governmental immunity. A commonwealth court of Pennsylvania reversed the decision and remanded the case for retrial. Since proper gym floor matting is an essential safety element of a gymnasium floor utilized for a vaulting stunt, the court found it within the district's care, custody, and control of its real property, and therefore subject to the real property exception to governmental immunity.

In another Pennsylvania case involving a gymnasium accident, parents of a sixteen year old student brought an action against the school district.[46] While using a set of collegiate gymnastic rings during gym class, the student fell rendering himself a quadriplegic. The trial court entered a summary judgment in favor of the school district. A commonwealth court of Pennsylvania again reversed the decision and remanded the case. The court upheld the parent's contention that the facts in their complaint place it within the real property exception. Such immunity can be denied, the court explained, "only when there is negligence which makes government-owned property unsafe for the activities for which it is regularly used."[47]

Statutory Immunity. A student was sexually assaulted by another student at a South Carolina school which serviced mentally retarded children. The action brought against the school board on behalf of the injured student was dismissed by the trial court citing the immunity of the school. On appeal, it was contended that the school was in actuality a hospital or other medical facility and therefore sovereign immunity was statutorily waived. In affirming the lower court decision, the Supreme Court of South Carolina recognized that the physical services given to the students were more extensive than those given to the rest of the student population. However, these were seen as secondary to the school's mission to educate children.[48]

In Georgia, a school district and principal were judged statutorily immune from a suit brought for injuries sustained when a student slipped on a wet floor and fell down stairs. The immunity provided was not found to have deprived the student of property without due process of law.[49]

Other Defenses/Notice of Claim

In addition to claims of immunity, other defenses can apply to negligent tort actions. The timely notice of claim requirement is designed to allow defendants an opportunity to investigate a claim while the facts surrounding it are still recent. Failure to make timely notice can be grounds for the dismissal of a complaint.

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[46] McCloskey, v. Abington School Dist., 515 A.2d 642 (Pa. Commw. Ct. 1986).
[47] *Id.* at 644.
[48] Miller v. Gertz, 341 S.E.2d 620 (S.C. 1986).
[49] Sisson v. Douglas County School Dist., 351 S.E.2d 272 (Ga. Ct. App. 1986).

A Florida mother brought suit against the school board for injuries allegedly suffered by her daughter in physical education class.[50] A week after the injury the plaintiff's attorney sent written notice of the accident to the superintendent of schools, the county manager, and the board's insurer. Nearly eleven months later a claims representative for the board's insurer sent a letter indicating the claim was being investigated. Following that, contact between the attorneys for the two sides indicated that the insurer was interested in settling the case. By the time a settlement was reached, and medical documentation assembled and sent to the insurer, the three year notice period had run out. Based on this the insurer backed out of the settlement. The plaintiff said that she did not give timely notice to the Department of Insurance because the action of the claims representative caused her to believe that the case would be settled. Rejecting this argument, the district court dismissed the case for lack of statutory notice. The court of appeals reversed that decision recognizing that notice may be waived.

> [W]hen responsible agents or officials of a city have actual knowledge of the occurrence which causes injury and they pursue an investigation which reveals substantially the same information that the required notice would provide, and they thereafter follow a course of action which would reasonably lead a claimant to conclude that a formal notice would be unnecessary, then the filing of such a notice may be said to be waived. If the claimant, as a result of such municipal conduct, in good faith fails to act, or acts thereon to his disadvantage, then the estoppel against the requirement of the notice may be said to arise.[51]

In New York, the parents of a student who allegedly was injured when he was pushed and his head hit a chair, brought suit against the school district.[52] General municipal law stated that the defendant school district was entitled to hold a hearing, which could include a physical examination of the injured party, as a condition to the plaintiff instituting an action. The law required the demand be served within ninety days from the filing of the notice of claim. The plaintiffs moved for an order striking the school district's affirmative defense which alleged violation of the general municipal law.

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[50] Meli v. Dade County School Bd., 490 So. 2d 120 (Fla. Dist. Ct. App. 1986).

[51] *Id.* at 121. *See also* Dallas Indep. School Dist. v. Porter, 709 S.W.2d 642 (Tex. 1986) (decision on a notice of claim in a worker's compensation case filed by the widow of the employee was reversed, but on the issue of jurisdiction).

[52] Rizzi v. Patchogue Medford UFSD No. 24, 503 N.Y.S.2d 967 (Sup. Ct. 1986).

In granting the order, the court explained that although the school district did not meet the time requirement, the time period was not to be construed as a statute of limitation. At the same time, there was no general requirement that an injured plaintiff must wait until a hearing is held to commence his action.

Whether a notice of claim requirement applied to a handicapped student was at issue in another New York case.[53] In an action brought by a student to recover for personal injuries, the defendant school district sought to have the complaint dismissed citing an expired statute of limitations. The motion was denied and the school district appealed. The supreme court, appellate division reversed the decision finding that the lower court should have conducted a hearing before finding the student, who was mentally handicapped, to be insane as defined by statute. The court, however, found an issue of fact as to the extent of the student's ability to handle her own affairs and remitted the case for a proper hearing. It was seen as obvious that a mentally handicapped individual, unable to function in society, could qualify as insane and be entitled to a waiver of notice requirements.

In California, a claim was made that a student's injury was a result of the school district's failure to property maintain its premises. Seven months after the school district claimed to have mailed a rejection of the claim, the guardian of the student filed the complaint. A superior court granted the district a summary judgment based on the fact that the plaintiff had not filed the complaint within the sixth month period provided by law. The court of appeals reversed the decision pointing out that the district's declaration did not sufficiently establish that the rejection had been mailed at the time claimed.[54]

LIABILITY INSURANCE

The extent to which an insurer must defend school board members was the issue in an Illinois case.[55] A former school director brought an action against the members of the school board holding them liable for injuries suffered as a result of his allegedly wrongful termination. The motion considered by the district court was the determination of whether the school district's insurer owed the school board members a defense of the action under a general liability insurance policy. While the court recognized that it was highly questionable whether many of the injuries would ultimately provide a basis for recovery, Illinois law provides that even groundless, false, or fraudulent allegations support an insurer's duty to defend. In so ordering, the court reminded that the liability of the insurer would ultimately be determined by the facts as they come out at trial.

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[53] Kelly v. Solvay Union Free School Dist., 498 N.Y.S.2d 935 (App. Div. 1986).

[54] Rincon v. Burbank Unified School Dist., 224 Cal. Rptr. 88 (Cal. Ct. App. 1986). *But see* Salo v. Board of Educ., 498 N.Y.S.2d 925 (App. Div. 1986) (notice of claim requirement was upheld where no adequate excuse for dely was provided).

[55] Kufalk v. Hart, 636 F. Supp. 309 (N.D. Ill. 1986). *See also* Government Employees Ins. Co. v. Gibraltor Casualty Co., 229 Cal. Rptr. 57 (Ct. App. 1986).

A Philadelphia school district's liability insurer brought an action seeking reimbursement for costs incurred defending two teachers in a wrongful death action. A student had drowned on a weekend trip organized by the teachers. The court of appeals reversed the district court judgment for the school district. The holding was that by joining the teachers as third-party defendants, the district acquired the same status it would have had if it had been named a party in the original complaint. This was seen as true, even though the complaint contended that the teachers were not acting within the scope of their employment. Pennsylvania law requires political subdivisions to defend personal injury actions against their employees unless there has been a judicial determination that the act or omission was not within the scope, office, or duties of the employee.[56]

There were three other instances where liability insurers were found responsible for legal expenses incurred by school districts. Criminal charges against a New Jersey school employee were dismissed, and the school board had become liable for court costs. The appeals court found the insurer liable for the costs, as a compensable accident had occurred within the meaning of the indemnity policy issued to the school board.[57]

A school board in New York brought a successful action against its liability insurer for an alleged breach of contract to pay the board's expenses for defending against a segregation suit.[58] And, in Mississippi, when a school district sued its insurer for an alleged bad-faith refusal to pay benefits, the district court required that dispensation be made by the insurance company at each stage of the proceeding, rather than after all appeals.[59]

In two cases, liability insurers were successful in their actions to remove all or part of their responsibility. A Nebraska school district sought reversal of a decision in which its insurer was not required to pay for losses incurred in a suit by a student's parents.[60] The parents had initiated the action to stop the consolidation of certain schools in the district. In affirming the lower court's decision, the Supreme Court of Nebraska held that the causes for action in the suit sought relief for other than monetary damages and therefore, under the terms of the policy, the insurer was not responsible for the district's legal costs.

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[56] Atlanta Int'l Ins. v. School Dist. of Philadelphia, 786 F.2d 136 (3d Cir. 1986).

[57] Meeker Sharkey v. National Union Fire Ins., 506 A.2d 19 (N.J. Super. Ct. App. Div. 1986).

[58] Board of Educ. v. CNA Ins. Co., 647 F. Supp. 1495 (S.D.N.Y. 1986).

[59] Western Line Consol. School Dist. v. Continental Casualty Co., 506 A.2d 19 (N.J. Super. Ct. App. Div. 1986).

A Michigan music teacher, who was injured in an automobile accident, was disabled as defined by both her automobile insurance company and the insurer of the school board. The board's insurance company paid no-fault wage benefits, but deducted a portion as a result of a social security award, The court of appeals agreed that the teacher was not required to exhaust the internal grievance procedures under the terms of her collective bargaining agreement prior to bringing her action for the deducted amount. However, the court held that the insurer and the board of education were entitled to off set the social security disability benefits received by the teacher. The intent of the state's legislation in this area was, the court explained, "to prevent the payment of no-fault benefits duplicating governmental benefits."[61]

EMPLOYEE INJURIES / WORKER'S COMPENSATION

A New York teacher, who was injured when a metal object was hurled into a school yard from an adjoining property, brought an action against the school board.[62] The Bronx County Supreme Court dismissed the complaint and the teacher appealed. The appellate court found that by not taking any steps to prevent injuries to teachers and students, or providing even minimal information of the periodic occurrence of similar incidents, the complaint against the school board had to be reinstated.

A Louisiana teacher, who was a victim of an armed robbery on school premises, brought an action against the school board to recover the value of property taken from her.[63] In affirming the district court decision, the court of appeals held that the board could not reasonably have been expected to forsee that an unrepaired hole in the school's fence would create a dangerous place for the teacher to work.

Two cases from New York provide examples of unsuccessful attempts to recover for injuries allegedly caused by negligence. A teacher who was carrying a carton through the aisle of the supply room in her school, fell over a small box on the floor resulting in injury. The appellate court upheld the dismissal of her suit against the school board explaining that she had not shown the board created the condition that caused the accident, or had active or constructive notice of the allegedly dangerous condition.[64]

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[60] Sandy Creek Pub. Schools v. St. Paul Surplus, 384 N.W.2d 279 (Neb. 1986).

[61] Grau v. Detroit Auto. Inter-Ins. Exchange, 383 N.W.2d 616, 619 (Mich. Ct. App. 1986).

[62] Rubino v. City of New York, 498 N.Y.S.2d 831 (App. Div. 1986). *See also* Blood v. Board of Educ., 509 N.Y.S.2d 530 (App. Div. 1986) (school teacher's negligence did not relieve corporation counsel of a statutory duty to defend her).

[63] Kavanaugh v. Orleans Parish School Bd., 487 So. 2d 533 (La. Ct. App. 1986). *See also* Litomisky v. St. Charles High School, 482 So. 2d 30 (La. Ct. App. 1986) (injured football referee failed to state a cause of action in his negligence suit against the school district).

A volunteer worker for a teacher's organization was injured when she fell in a middle school cafeteria. Her negligence action was against the teacher's organization and the school district.[65] The court of appeals upheld the earlier jury verdict finding the accident not to be attributed to negligence. Although there was conflicting testimony as to the condition of the floor at the time of the accident, the court explained that:

> When a plaintiff challenges an unfavorable verdict on the grounds that it is against the weight of evidence, the motion should not be granted unless a preponderance of the evidence is so greatly in the plaintiff's favor that the jury could not have reached its conclusion on any fair interpretation of the evidence.[66]

The duty risk analysis used to determine legal responsibility in tort claims was outlined in a decision involving an injury in a physical education class.[67] A teacher's aide in a Louisiana high school was injured when she was struck by a ball thrown by a student. The aide brought an action against the parents of the student. The district court denied the claim and the aide appealed. The appellate court explained that the pertinent inquiries are: (1) whether the conduct of which plaintiff complains was a cause-in-fact of the harm; (2) whether there was a duty owed on the part of the defendant which was imposed to protect against the risk involved; (3) whether there was a breach of that duty; and (4) damages.

On the first inquiry, the defendants admitted that the student's action was the cause-in-fact of the harm. On the second, the court expressed no knowledge of any duty "placed upon a participant in a sports activity abiding by the rules of the game to refrain from accidentally injuring a spectator who is fully aware of the risks involved."[68] Having thus ruled, the third and fourth inquiries were not addressed. The aide also contended that the trial court failed to properly apply strict liability to the facts of the case. Under such a condition, parents can be held

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64. Fink v. Board of Educ., 498 N.Y.S.2d 440 (App. Div. 1986).
65. Rowe v. Board of Educ., 502 N.Y.S.2d 294 (App. Div. 1986).
66. *Id.* at 295.
67. Melder v. State Farm Fire & Casualty Co., 498 So. 2d 1095 (La. Ct. App. 1986).
68. *Id.* at 1096.

responsible for an act of a child for which the child would have been responsible except for his age. As the court found no violation of law by the child, his parents could not be held in strict liability.

As compared with recent years, there was an increase in the number of worker's compensation cases in 1986. While there were several cases decided on jurisdictional or other technical issues,[69] those which were fully examined were more often than not decided for the worker.

A school cafeteria worker in Texas, who was injured when she tripped over a dough mixer filed for worker's compensation disability benefits. The district court's decision, later affirmed by the court of appeals, disregarded the jury's findings regarding the worker's claim of total loss of the use of her lower left leg. The Supreme Court of Texas reversed that decision holding that the fact that the worker returned to work during part of the period of disability, was not conclusive on the issue of total loss. The court reminded that:

> In reviewing a worker's compensation case, this court has always recognized that because the injured employee, coming under the terms of the Workers' Compensation Act, is denied his common law rights, the Act should be liberally construed in the worker's favor. If there be any reasonable doubt which may arise in a particular case as to the right of the injured employee to compensation, it should be resolved in favor of such right.[70]

A Pennsylvania teacher who lost four front teeth after being attacked by students, brought an action for worker's compensation.[71] In the appeal from the award for benefits, the commonwealth court held that the award was proper. The key issue was whether pictures of the teacher without teeth were an actual representation of her appearance, as she did have a fixed bridge prothesis. The court held that the worker's compensation referee had properly exercised his discretion in assessing the degree of her disfigurement.

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[69] Malone v. Industrial Comm'n of Ill., 489 N.E.2d 1167 (Ill. App. Ct. 1986) (claimant's failure to file a receipt showing payment of probable costs of record deprived a circuit court of jurisdiction); Collins v. Waterford School Dist., 385 N.W.2d 712 (Mich. Ct. App. 1986) (worker's compensation board gives jurisdiction over circuit court during pendency of an appeal to the board); Guillory v. State, 486 So. 2d 1195 (La. Ct. App. 1986) (statement that clear and convincing evidence was the standard of proof to be applied was held to be a harmless error); Duos v. Evangeline Parish School Bd., 499 So. 2d 1067 (La. Ct. App. 1986) (teacher's suit barred for untimely notice); Bickham v. Orleans Parish School Bd., 488 So. 2d 1248 (La. Ct. App. 1986) (negligence action found inappropriate remedy for injuries from sexual assault); Ringgold School Dist. v. W.C.A.B., 507 A.2d 876 (Pa. Commw. Ct. 1986) (claimant's disability benefits determined to be property based upon weekly wage on date of original injury rather than his wages at the time of recurrence of disability).

[70] Navarette v. Temple Indep. School Dist., 706 S.W.2d 308, 309 (Tex. 1986). *See also* Port Neches Indep. School Dist. v. Soignier, 702 S.W.2d 756 (Tex. Ct. App. 1986) (plaintiff was never told to stay off a basketball goal while painting a school gymnasium when it was obvious that the scaffold would not reach the area where the accident occurred).

[71] School Dist. of Philadelphia v. W.C.A.B., 511 A.2d 947 (Pa. Commw. Ct. 1986).

In Texas, a school district employee who injured his back while working brought suit against the district for workman's compensation.[72] The district claimed that the employee had not followed medical advice that he lose weight and exercise to maximize his opportunity for recovery. The court of appeals affirmed a lower court decision that the employee was entitled to compensation as his failure to lose weight and exercise were not willful practices.

The long-term effects of an injury were examined in a Michigan case.[73] The Workman's Compensation Appeal Board awarded a school bus driver disability benefits for an injury he sustained while working. Eighteen months after the original injury, the driver further injured his back while moving from his residence. He admitted to lifting some light objects. Following a hearing, his claim for benefits was denied because he had aggravated his back injury by moving personal goods. A divided panel of the appeal board reversed the hearing officer's ruling because the driver's work related injury was found to contribute to his disability. In affirming that decision, the Michigan Court of Appeals found that the driver had no reason to know the hazard he was exposing himself to by picking up light objects.

A case which was decided against the worker was brought as a fatal claim petition by the widow of a Pennsylvania superintendent of schools.[74] She alleged that job related stress was a precipitating factor in triggering her husband's fatal heart attack. The school district appealed an order of the Workman's Compensation Appeal Board awarding benefits to the widow. The commonwealth court reversed that decision determining that the original finding that the heart attack was job related was unsupported by testimony.

Whether a state can allow school districts to operate without workman's compensation was the issue in a case from Mississippi.[75] That state had a legislative exemption of state employees from mandatory workman's compensation coverage. In upholding the dismissal of a claim against a school district, the Supreme Court of Mississippi recognized that all school systems in the state did not have the financial resources to purchase such coverage. This, the court determined, provided a rational basis for making such coverage discretionary.

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[72] Austin Indep. School Dist. v. Maynard, 711 S.W.2d 377 (Tex. Ct. App. 1986).

[73] Schaefer v. Williamston Community Schools, 387 N.W.2d 856 (Mich. Ct. App. 1986). *But see* Mitchell v. Orleans Parish School Bd., 483 So. 2d 1272 (La. Ct. App. 1986) (a claim was denied as the worker's later injury to her knee was found unrelated to her earlier injury to her neck and back).

[74] Rockwood Area School Dist. v. W.C.A.B., 511 A.2d 263 (Pa. Commw. Ct. 1986).

[75] Adams v. Petal Mun. Separate School Systems, 487 So. 2d 1329 (Miss. 1986). *See also* Board of Educ. v. Renehan, 504 A.2d 635 (Md. 1986) (workman's compensation was reduced to the point where the amount already paid exceeded the total sum due and the employer and insurer were not required to continue making payments to satisfy the claimant's debt to her attorney).

In a final case involving the injury of a school employee, a New York city teacher brought an action against the city to recover for damages incurred when she was injured trying to stop a fight in the school cafeteria.[76] Prior to his action, the teacher requested that a security guard accompany him to the scene of the confrontation. When the teacher intervened, he was assaulted by one of the students while the security guard stood by and took no action. In reversing the trial court and deeming the case appropriate for trial, the appellate court found that a reasonable person would construe the guard's actions as an implicit promise of aid. The guard's conduct was seen as creating a special relationship which established a duty to protect the teacher. It was left for trial to determine whether that duty had been breached.

ASSAULT AND BATTERY

An Illinois high school student faced a charge of battery in an incident on a school bus.[77] The driver had instructed the student to put out his cigarette. Although the student complied, he called the driver names and threatened her. Following other incidents on the way home, the driver returned the students to school. The next day, after discharging the last of her students, the driver's bus was hit by a barrage of rocks causing her great physical harm. Despite the contradictory nature of the testimony of the students present during the stoning incident, it was established that the defendant was one of the group throwing rocks. He was charged and convicted of two counts of aggravated battery. The Appellate Court of Illinois did not accept the argument that the defendant only knowingly threw rocks, and did not knowingly cause great bodily harm.

As a result of being assaulted by an intruder in her office, a New York board of education employee brought action against the board.[78] The supreme court, appellate division affirmed a lower court determination that the board could not be held liable absent a showing that it owed a special duty to the employee. Additionally, the employee failed to show any evidence of prior criminal acts in the building, or an absence on the part of the board to take reasonable steps to minimize the foreseeable danger.

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[76] Bloom v. City of New York, 507 N.Y.S.2d 13 (App. Div. 1986).

[77] People v. Lesley, 494 N.E.2d 270 (Ill. App. Ct. 1986).

[78] Ferrara v. Board of Educ., 498 N.Y.S.2d 10 (App. Div. 1986).

Michigan students and parents brought an action against the school district and related parties for battery, false imprisonment, negligent hiring, use of unreasonable force on a student, and violation of civil rights.[79] The suit was brought due to the actions of a teacher who used physical force to bring a student to the office. The Michigan Court of Appeals affirmed the trial court's decision which dismissed the civil rights count, and found (1) the state's corporal punishment statute did not deny equal protection of the law, (2) the school district was immune from counts of negligent hiring and supervision, (3) the principal was immune on the count of false imprisonment, and (4) the cause of action against the teacher for his false imprisonment was not substantiated.

The interpretation of the Idaho Torts Claim Act (ITCA) was the basis for a decision in a case concerning four elementary school students who had been sexually molested by their fourth grade teacher.[80] The plaintiffs, through their parents, sought damages naming the teacher and school district as defendants. The teacher admitted some of the complaints, and then cross-claimed against the school district for indemnification under the ITCA. The school district answered by denying any liability and cross-claimed against the teacher for indemnification. The district answered the plaintiff's complaints by denying liability and counter claiming for attorney's fees.

The district court held that the plaintiffs were precluded from recovery under the assault and battery exception to the ITCA. In addition, the court held that the teacher could not seek indemnification because he was not acting within the course and scope of his employment when he committed the sexual acts. Both the plaintiff and the teacher appealed.

On the issue of the teacher's cross-claim for indemnification, the criminal intent of his actions was recognized by the Supreme Court of Idaho. This absolved the district from indemnifying him as a matter of law. However, the court reversed the decision involving the plaintiff's claim against the school district. A distinction was drawn between the conduct which forms the basis of a cause of action in negligence and one for assault and battery. The ITCA made every state governmental entity liable for damages arising out of its negligent acts or omissions. The court found the injuries to the children the foreseeable consequences of the district's negligence in retaining the teacher despite full knowledge of his proclivities.

A charge of battery was brought in small claims court against a New York school bus matron who slapped a child. Although the slap was not found to be an excessive use of force, the matron was found liable. A New York City civil court reached the same conclusion explaining that "any person who physically assaults a child for any reason other than self-defense or the defense of others is liable to that child for monetary damages."[81]

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[79] Willoughby v. Lehrbass, 388 N.W.2d 688 (Mich. Ct. App. 1986).

[80] Doe v. Durtschi, 716 P.2d 1238 (Idaho 1986).

DEFAMATION

After obtaining a permanent appointment as a school district's superintendent of buildings and grounds, an administrator sued a newspaper for defamation.[82] In affirming and modifying a lower court decision, a New York appellate court made the following determinations: (1) the series of articles published expressed or implied political influence and manipulation in the plaintiff's quest for appointment, but absent a clear assertion of criminality, these were not defamatory; (2) two published editorials were not libelous as editorial opinion may not be the subject of a defamation action, provided that the facts supporting the opinion are set forth; (3) the publication of an anonymous letter to the editor was seen as requiring a determination of fact at trial as to whether it was printed with malice.

A formerly employed high school teacher brought a slander action against a school superintendent based on statements the superintendent made in response to an inquiry from a potential employer.[83] The superior court entered judgment on a jury verdict for the teacher. In upholding that decision, the Supreme Judicial Court of Maine examined three contentions made by the defendant. First, the superintendent was performing a discretionary function or duty. The court disagreed, pointing out that the teacher had not worked in the district for two years and was seeking employment elsewhere. Second, the superintendent's statements were expression of opinion protected by the first amendment. The court disagreed explaining that an essential element of slander is that the statements in question contain false statements of fact. The statements implying that the plaintiff was not a good teacher, failed to give assistance outside the classroom, and was not involved in extracurricular activities, were not found factually based. Third, the defendant is a public official and therefore must prove actual malice. Again the court disagreed, finding that the authority exercised by a teacher is very limited. Teachers do not have access to channels of effective communication enjoyed by public officials and public figures. Therefore, the trial court did not err in ruling the teacher was not a public official.

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[81] Rodriguez v. Johnson, 504 N.Y.S.2d 379, 382 (Civ. Ct. 1986).

[82] DiBernardo v. Tonawanda Publishing Co., 499 N.Y.S.2d 553 (App. Div. 1986). *See also* Mahoney v. Adirondack Publishing Co., 509 N.Y.S.2d 193 (App. Div. 1986) (high school football coach was successful in a libel action against a newspaper); O'Neil v. Peekskill Faculty Ass'n, 507 N.Y.S.2d 173 (App. Div. 1986).

[83] True v. Ladner, 513 A.2d 257 (Me. 1986).

A defamation action was filed by an Alabama high school student against the school board.[84] The boy's father had addressed the board seeking the removal of a suspension for marijuana possession from his son's record. In an appeal of a circuit court decision, the Supreme Court of Alabama held that statements made by a school board member, and later broadcast by a local radio station, were a fair response to charges made against the board. The court added that the record showed the board had suggested the matter could be better considered in executive session, but the father had wanted a public airing of the complaint.

A former substitute teacher brought suit alleging that the school board had refused to hire her for a vacancy and dropped her from the list of approved substitute teachers in violation of her constitutional rights.[85] The district court found that although her speech at a school board meeting was protected under the first amendment, she did not have the property interest necessary to state a claim. The teacher's claim that a statement by the school board president was defamatory was not upheld as the court explained that statements of pure opinion which are not defamatory could not be a basis for a slander suit. For a statement of opinion to be defamatory in nature, the plaintiff would have to demonstrate that the opinion implied the existence of undisclosed defamatory facts.

A Minnesota teacher brought a defamation action against the school board, superintendent, and principal. In addition, he claimed there had been a violation of an open meeting law and civil rights law.[86] The court of appeals, in affirming the district court, found that the publication of school board proceedings at which allegations against the plaintiff were discussed was mandatory by statute. Therefore, the school board and school officials had absolute privilege with regards to the defamation claim. Since the teacher was not found entitled to a private hearing, the action for deprivation of civil rights could not be maintained.

PRODUCTS LIABILITY

A South Carolina school district brought a suit against two asbestos companies to recover the costs of removing and replacing ceilings containing asbestos.[87] After the district court found in favor of the companies, the school district appealed. The court of appeals set that decision aside finding that a manufacturer who sells a defectively designed dangerous product cannot escape liability by showing it could not have known of the defect. By instructing the jury otherwise, the trial court was found to have erroneously explained the concept of an implied warranty. Therefore, a new trial was deemed necessary.

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[84] Morrison v. Mobile County Bd. of Educ., 495 So. 2d 1086 (Ala. 1986).

[85] Lees v. West Greene School Dist., 632 F. Supp. 1327 (W.D. Pa. 1986).

[86] Grossman v. School Bd., 389 N.W.2d 532 (Minn. Ct. App. 1986).

[87] Spartanburg County School Dist. v. National Gypsum Co., 805 F.2d 1148 (4th Cir. 1986).

In a second case involving asbestos, a Colorado school district brought an action against a company which designed, manufactured, distributed, and applied the asbestos products that were incorporated into the construction of the plaintiff's schools.[88] It was alleged that the defendants conspired to ignore, suppress, and not act upon the medical and scientific data in their possession indicating the hazards to the public from asbestos. Based on the theory of strict liability, the district sought damages relating to the cost of removing and replacing the asbestos and the items allegedly contaminated. Recognizing the act of civil conspiracy, the district court upheld all the plaintiff's claims, and explained that the United States Congress, in enacting the Asbestos School Hazard Detection and Control Act of 1980, recognized the dangers caused by exposure to asbestos fibers.

The Supreme Court of Alabama affirmed a circuit court decision that a school bus dealer and bus manufacturer did not breach the state's extended manufacturer's liability doctrine by manufacturing and selling school buses without seatbelts for student passengers.[89]

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

A California high school teacher brought an action against his school district alleging an intentional infliction of emotional distress, as well as fraud and deceit.[90] In reversing the superior court and finding for the teacher, the court of appeals examined the district's breach of a settlement with the teacher concerning his teaching assignment. In recognizing the emotional distress caused this plaintiff, the court explained that employers should not be allowed to use the public policy behind worker's compensation as a shield against tort liability. As emotional distress is not contemplated under worker's compensation laws, the court held that it is not precluded by the exclusive remedy provisions of those statutes.

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[88] Adams-Arapahoe School Dist. v. Celotex Corp., 637 F. Supp. 1207 (D. Colo. 1986).

[89] Dentson v. Eddins & Lee Bus Sales, Inc., 491 So. 2d 942 (Ala. 1986). *See* McClendon v. Norwood, 346 S.E.2d 1 (Ga. Ct. App. 1986) (unverified allegations that playground equipment injured a student were not held sufficient to create a jury issue when opposed by factual affidavits); Jemaa v. MacGregor Athletic Products, 390 N.W.2d 180 (Mich. Ct. App. 1986) (former high school football player who was injured had products liability claim denied on jurisdictional grounds).

[90] Hodges v. Sweetwater Union High School Dist., 228 Cal. Rptr. 464 (Cal. Ct. App. 1986).

An action for intentional infliction of emotional distress and invasion of privacy was brought against a computer service by a teacher.[91] She alleged that the service had inadvertently placed scores from a state ordered Certified Personnel Testing Program in wrong envelopes. This resulted in her score being sent to another teacher. The plaintiff claimed this caused her to suffer mental anguish and extreme emotional distress.

The district court explained that to meet the test for emotional distress, "the conduct by the wrongdoer must be willfully and wantonly engaged in and be so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized society."[92] In denying the claim the court held that, at most, a simple mistake was made. That alone was seen as insufficient to support a claim. On the issue of privacy, the court again failed to find a cause of action. There was no contention that the computer service, or anyone other than the plaintiff, communicated the scores to anyone other than the person who inadvertently received them. Thus, the communication of the scores to a single person was not held to be a violation of the plaintiff's privacy.

In an unusual action, the mother of an eight year old California girl who had been sexually assaulted and raped, brought an action against the school district for negligent and intentional infliction of emotional distress.[93] Over a period of four months the child was assaulted en route to school and on school premises by a thirteen year old male student. During this time, although the girl's teacher, principal, and the school psychologist knew of the assaults, the girl's mother was not informed. The mother theorized that had she been informed of the earlier assaults, she could have taken precautionary measures to prevent the rape. As a result of the school's failure to notify her of the assaults, the mother claimed to have suffered severe emotional distress. After her cause for action was denied by the superior court, the mother sought a writ of mandate for reinstatement. The court of appeals issued the writ, seeing the injuries for emotional distress to be reasonably foreseeable. In holding that a special relationship existed between the school and the mother, the court found that the school had a duty to notify the mother.

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[91] Wood v. National Computer Systems, 643 F. Supp. 1093 (W.D. Ark. 1986).

[92] *Id.* at 1097. *See also* Spence v. Board of Educ. of Christine School Dist., 806 F.2d 1198 (3d Cir. 1986) (damages for emotional distress were not found to be presumed from an infringement of a teacher's first amendment rights).

[93] Phyllis P. v. Superior Court, 228 Cal. Rptr. 776 (Ct. App. 1986).

CONSTITUTIONAL TORTS

A San Diego committee against registration and the draft (CARD) alleged that a school board's actions and policies served to deprive the organization of its rights under the first and fourteenth amendments.[94] In particular, the organization's advertisements had been excluded from high school newspapers. The court of appeals reversed the district court's decision that the school board failed to show a compelling governmental interest for excluding the advertisements. By accepting military recruitment advertisements, the court held that a limited public forum had been created. The board failed to show any reasonable grounds for excluding CARD from its newspapers.

Student Initiated Cases

A Vermont school board was the defendant in an action brought by high school students who claimed an abridgment of their first amendment rights.[95] At issue was the board's refusal of permission for the production of a play concerning child runaways. The board's position was that the themes of drug abuse, alcoholism, prostitution, child abuse, and rape would compel the seeking of parental consent to view the production for many children. Furthermore, the board felt that such a production would be an improper allocation of educational resources and would not suitably fulfill the aims of public education.

The plaintiffs' section 1983 action asserted the defendant's liability for a direct abridgment of first amendment rights of free speech and communications, and for deprivation of a liberty interest in free speech without due process of law. The district court determined that there had been no direct abridgement since the students' right to free expression had to give way to the board's responsibility for the well being of the larger student body. Additionally, since there had been no auditions at the point the board disapproved the play, the student plaintiffs had no legitimate expectation that they would participate. Because there was no entitlement to participate in the play, the students had no entitlement to exercise their first amendment rights through such participation. Thus, the court concluded, the students had no liberty interest sufficient to evoke constitutional due process protection.

A Missouri student and her parents brought a civil rights action citing discrimination on the part of the school district.[96] It was alleged that the discrimination was with respect to the student's placement in an instructional math class. Following a finding in favor of the defendants, they moved for an award for attorneys' fees. In upholding the district's claim, the appellate court explained its intention to help deter the filing of frivolous or groundless civil rights suits.

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[94] San Diego Comm. v. Governing Bd., 790 F.2d 1471 (9th Cir. 1986).

[95] Bell v. U-32 Bd. of Educ., 630 F. Supp. 939 (D. Vt. 1986).

[96] Bond v. Keck, 629 F. Supp. 225 (E.D. Mo. 1986). *See also* Raposa v. Meade School Dist., 790 F.2d 1349 (8th Cir. 1986) (teacher's first amendment rights not violated and teacher lacked property and liberty interest under fourteenth amendment).

Employee Initiated Cases

A high school teacher in Florida brought an action claiming that, because of his exercise of his first amendment rights, school officials had retaliated against him through teaching assignments.[97] The teacher had met with his principal, that principal's replacement, and the superintendent of schools regarding registration procedures, the assignment of uncertified teachers to classes, and changes in his own assignment. After a second year of assignments he felt were inappropriate, the teacher filed this action.

In affirming the lower court decision against the teacher, the court of appeals outlined the analytic framework which gave definition to the plaintiff's first amendment claim. For that claim to prevail, the plaintiff had to establish that his speech was both constitutionally protected, and a substantial or motivating factor in the decision to alter his teaching assignments. If successful in making this showing, the burden would then shift to the school administrators to show they would have altered his teaching assignments even in the absence of his protected speech.

The court cited the decision in *Connick v. Meyers*[98] as the most recent Supreme Court examination of the issue. In that case, it was determined that the question of whether a public employee's speech is constitutionally protected turns upon whether the speech relates to a matter of public concern, or to one of mere personal interest to the employee.

The burden of proof in the instant case was found to fall upon the teacher rather than upon the administrators. The teacher admitted that he spoke out against the method of registration because it contributed to his inability to maintain control of students. His speech concerning teaching assignments likewise was seen as an employee's grievance concerning internal school policy. After considering the form, content, and context of the teacher's speech, the court concluded that it could not fairly be characterized as constituting speech on a matter of public concern.

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[97] Ferrara v. Mills, 781 F.2d 1508 (11th Cir. 1986).

[98] 461 U.S. 138 (1983). *But see* Cox v. Dardanelle Pub. School Dist., 790 F.2d 668 (8th Cir. 1986) (court upheld teacher's contention of wrongful discharge for exercising her first amendment rights).

In Virginia, an unmarried pregnant teacher, who was forced to take a leave of absence, brought suit alleging a violation of her constitutional right to privacy and her statutory rights under title VII.[99] The district court agreed with her privacy claim, explaining that her rights to privacy included the right to bear a child out of wedlock.[100] The school board was unable to assert a state interest outweighing that of the teacher. Similary, the violation of the teacher's title VII rights were recognized.

A tenured teacher in Michigan was suspended following a parent's complaint about his teaching methods in a seventh grade science course. It was alleged that he showed sexually explicit pictures and films. Before being reinstated, the teacher brought an action against the board of education, school administrators, and parents alleging a deprivation of liberty and property without due process of law, and a violation of his first amendment right to academic freedom.[101]

The district court instructed the jury on the elements of compensatory and punitive damages, and also charged the jury that additional compensatory damages could be awarded based on the value or importance of the constitutional rights that were violated. The jury found the school district liable and awarded both punitive and compensatory damages. That decision was affirmed by the court of appeals.

The issue examined by the Supreme Court was whether an award of compensatory damages could be based on an assessment of the value of a substantive constitutional right. The Court reversed the lower court decision and remanded the case for a new trial limited to the issue of compensatory damages. The Court held that the abstract value of a constitutional right cannot be the basis for section 1983 damages.

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[99] Ponton v. Newport News School Bd., 632 F. Supp. 1056 (E.D. Va. 1986). *See also* Jones v. McKenzie, 628 F. Supp. 1500 (D.D.C. 1986) (subjecting school bus attendant to urinalysis without probable cause or any individualized suspicion was found to be a violation of her fourth amendment rights).

[100] Carey v. Population Servs. Int'l, 431 U.S. 678, 686 (1977).

[101] Memphis Community School Dist. v. Stachura, 106 S. Ct. 2537 (1986).

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SPORTS

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INTRODUCTION

This Chapter is new to the *Yearbook* and includes all cases involving student-athletes, coaches, athletic directors, athletic associations, booster organizations, sports programs and events, and sports facilities and equipment at both the k-12 and higher education levels, but does not include case law involving physical education or intramural participation.

The case law in this section primarily is based on the fourteenth amendment, title IX of the Education Amendments of 1972, title VII of the Civil Rights Act of 1964, or 42 U.S.C. section 1983 (Civil Rights Act of 1871). Each of these laws is briefly discussed in the next section of this chapter. Following that discussion is a summary of the related case law in the sports area.

RELATED CONSTITUTIONAL PROVISIONS AND STATUTES

Fourteenth Amendment

The fourteenth amendment states in part that "[n]o [s]tate shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Because public schools are considered part of the "state" for fourteenth amendment purposes, public school educators are required to treat similarly all classes of persons and to provide adequate due process where liberty and property interests allegedly are denied.

Equal Protection. If a government policy or law *facially discriminates* against an individual on the basis of a *suspect classification* (e.g., alienage, race, nationality[1]) or affects a *fundamental right* (an explicit or implicit constitutional right—e.g., to assemble, to vote, to procreate[2]), such provisions will be *strictly scrutinized* by the courts and will be justified only if a *compelling interest* can be proven. This high level of scrutiny is based on the principle that certain actions must be subjected to close analysis in order to preserve equality and liberty.

If neither a suspect class nor a fundamental right is involved, the challenged act must bear only a *rational relationship* to a legitimate governmental objective. Under this minimum scrutiny standard, acts are invalid only if they are "clearly wrong, a display of arbitrary power, not an exercise of judgment."[3]

In addition to the two extreme standards (strict scrutiny and rational relationship), the Supreme Court has established an *intermediate level of scrutiny* which requires the classification to serve important governmental objectives, and the discriminatory acts to be substantially related to the achievement of those objectives.[4] This standard is applied where mere rationality is too lenient and strict scrutiny is too demanding. A significant (though not necessarily fundamental) interest allegedly would be infringed, while a sensitive (though not necessarily suspect) class would be involved.

Education is not mentioned in the United States Constitution, nor is acquiring an education essential to involvement in rights that are guaranteed by the Constitution (e.g., neither education nor literacy is prerequisite to voting). As a result, education is not a fundamental right, but has been ruled both to be of "fundamental importance,"[5] and to quality as a "property right" under state law. Given this reasoning, if a standard higher than rational relationship is to be applied in situations involving the right to an education, it would require that a suspect, or at least quasi-suspect, class exist. (However, the Court has deviated from this position where students are denied free admission to public schools.[6])

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[1] *E.g.*, Graham v. Richardson, 403 U.S. 365 (1971) (alienage); Hunter v. Erickson, 393 U.S. 385 (1969) (race); Korematsu v. United States, 323 U.S. 214 (1944) (nationality).

[2] *E.g.*, Police Dep't v. Moseley, 408 U.S. 92 (1972) (right to assemble); Reynolds v. Sims, 377 U.S. 533 (1964) (right to vote); Skinner v. Oklahoma, 316 U.S. 535 (1942) (right to procreate).

[3] Mathews v. DeCastro, 429 U.S. 181, 185 (1976).

[4] Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142, 150 (1980); Craig v. Boren, 429 U.S. 190, 197 (1976).

[5] San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973).

[6] Plyler v. Doe, 102 S. Ct. 2382, 2398 (1982).

In addition to the above, it should be noted that not all policies or laws facially discriminate; in fact, most are *facially neutral,* but may be applied or enforced in a discriminatory manner. In such situations, the plaintiff must prove that the discriminatory act was purposeful and that there was an intent to discriminate. Although it is not impossible to prove intent, it may prove exceedingly difficult in the majority of cases, even if actual discrimination exists.

Due Process. The fourteenth amendment also requires that neither life, liberty, nor property may be withdrawn or withheld from an individual unless there is an adequate determination that the deprivation is justified. Where a due process violation is claimed, the courts determine whether the plaintiff had a liberty or property interest at stake; whether governmental action infringed such an interest; and whether adequate due process procedures were followed. The more significant the property or liberty interest, the "more process that is due."

Education Amendments of 1972—Title IX

This antidiscrimination law stipulates in part that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving [f]ederal financial assistance . . . ."[7] The application of this law has been restricted in recent years; only those specific programs that receive financial assistance are required to comply. Due to this fact, recent cases involving alleged sex discrimination often are based on the fourteenth amendment, rather than title IX.

Civil Rights Act of 1964—Title VII

Title VII prohibits employers with fifteen or more employees, employment agencies, and labor organizations from discriminating against employees on the basis of race, color, religion, sex, or national origin and covers hiring, promotion, and compensation practices as well as fringe benefits and other terms and conditions of employment. Two legal theories have been developed for assessing the merits of claims of employment discrimination under this law: disparate treatment and disparate impact.

Disparate Treatment. This standard requires the plaintiff to prove a discriminatory motive on the part of the employer. It is similar to that required under the equal protection clause of the fourteenth amendment. In meeting this burden of proof, the plaintiff generally must establish that he (a) was a member of a protected class, (b) applied for the job, (c) possessed the qualifications for the position, and (d) was rejected. Also, it often must be demonstrated that the employer continued to seek applicants with plaintiff's qualifications. Once a discriminatory intent has been established, the employer then is responsible for showing a legitimate nondiscriminatory basis for plaintiff's rejection. However, even if the employer can establish such a basis, the plaintiff may then claim that the defendant's arguments are simply a pretext to a discriminatory motive.

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[7] 20 U.S.C. § 1681.

Disparate Impact. Under disparate impact, the plaintiff is not required to support a claim of discriminatory intent, but rather is required only to prove that the facially neutral practice had a disproportionate impact on the protected group to which plaintiff is a member. Once such a prima facie case is established, the employer then must prove that the policy or practice is justified by a business necessity. Furthermore, in disparate impact cases a nondiscriminatory reason for the act is insufficient to rebut the inference of discrimination.

Civil Rights Act of 1871—Section 1983

Section 1983 stipulates in part that,

> [e]very person who, under color of any statute, ordinance, regulation, custom, or usage, of any [s]tate or [t]erritory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution or laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.[8]

The term "person" is not defined in the Act, but the Supreme Court has concluded that local governments (including public school boards, cities, and counties) are persons and therefore may be sued under section 1983. Additionally, persons acting under color of state law may not claim eleventh amendment immunity, although individuals performing their responsibilities in good faith, even if later proven to be in error, may claim good faith immunity. Such immunity does not extend to public institutions,[9] or to individuals acting in bad faith.

The aforementioned laws have been the basis for much of the case law in the sports area. Cases decided in 1986, or decided in 1985 but not reported in the 1986 *Yearbook*, are briefly discussed in the remaining sections of this chapter.

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[8] 42 U.S.C. § 1983.

[9] Owen v. City of Independence, Mo., 445 U.S. 622 (1980).

ELIGIBILITY

In 1986 there were thirteen cases concerning student eligibility to participate in either interscholastic or intercollegiate sports. Of these cases, two dealt with age, one with discipline, one with grades, one with immunization, one with limitation on number of participants, one with number of years of participation, one with outside participation, one with residency, and four with transfer.

Age

In a case from the Michigan Court of Appeals, the hearing-impaired plaintiff was placed in special education classes until 1976 when he then was mainstreamed as required by civil rights laws.[10] However, when the mainstreaming took place the child was assigned to a class that was one grade level below that which his age would normally suggest. The parents apparently were satisfied with this arrangement until the child's senior year, when he was declared ineligible to play basketball because he had reached his nineteenth birthday prior to September 1. The child and his parents claimed a due process violation and filed suit. The appeals court ruled that neither the school's failure to conduct a placement hearing nor the athletic association's failure to provide an exception to the age rule violated the fourteenth amendment.

The second age-related dispute also involved a nineteen year old senior who was disqualified due to age—he had been held back in kindergarten due to a learning disability.[11] The student requested a hardship waiver to permit him to participate, but his request was denied; therefore, he filed suit in state superior court. That court ruled on his behalf and the Arizona Interscholastic Association appealed. The appeals court in part reversed and held that a constitutional right was not violated when the waiver was denied, and that the student should not receive attorneys' fees under section 1988, given that a section 1983 violation was not proven. In contrast, however, the court ruled that the Association violated its own rules when it failed even to consider the waiver request. Such an act did not violate the Constitution, but was in conflict with administrative law. Accordingly, that part of the trial court decision that supported the plaintiff's mandamus claim to compel the administrative board to exercise its discretion was upheld.

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[10] Nichols v. Farmington Pub. Schools, 389 N.W.2d 480 (Mich. Ct. App. 1986).

[11] Tiffany v. Arizona Interscholastic Ass'n Inc., 726 P.2d 231 (Ariz. Ct. App. 1986).

Discipline

In an intermediate court of appeals of Hawaii case, a student was forbidden from participating in a state track meet due to a pyrotechnics violation (i.e., the student had set off fireworks in the high school parking lot after school hours).[12] The court observed that the student had graduated, thereby making several of the related complaints moot, and that the denial of the right to participate in interscholastic athletics was not a liberty or property interest entitled to protection under the due process clause. However, the plaintiff was ruled to have met the requirements for an equal protection, section 1983 claim, and the case was remanded to determine whether local school officials acted in bad faith in their determination of penalty.

Grades

A 2.0 grade point average as one of several eligibility requirements for participation in extracurricular activities was the basis for suit in a Montana case.[13] Several students failed to meet this requirement and filed suit based on both the federal and state constitutions. The state supreme court ruled that participation in extracurricular activities was not a fundamental right under either constitution and that the "C" requirement did not violate either the equal protection or the equal educational opportunity concepts of the state constitution. In support of its position, the court noted that the government interest in developing the full educational potential of each person, and in providing a basic system of quality public education by the enactment of the 2.0 grade rule, outweighed the students' interest in participating in existing activities.

Immunization

In a unique case emanating from Pennsylvania, the student alleged that his religious beliefs were violated when he was required to receive a tetanus immunization as a condition for participation in interscholastic baseball.[14] The Commonwealth Court of Pennsylvania held that the requirement did not place an impermissible burden on students whose religious beliefs opposed immunization and that participation in interscholastic sports did not rise to the level of an important government benefit. In developing its position, the court argued that forgoing participation in interscholastic sports would not coerce the plaintiff to violate his religious beliefs, given that no pressure was placed on him to modify his behavior.

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[12] Makanui v. Department of Educ., 721 P.2d 165 (Hawaii Ct. App. 1986).

[13] State v. Board of Trustees, 726 P.2d 801 (Mont. 1986).

[14] Calandra v. State College Area School Dist., 512 A.2d 809 (Pa. Commw. Ct. 1986).

Limitation on Number of Participants

In another Pennsylvania case, a district policy restricting the number of students who may participate on football teams was challenged by a head football coach.[15] The court ruled that the plaintiff failed to identify any personal injury and thus did not have standing to bring the action.

Number of Years of Participation

In a New York school district, a student was denied the right to participate in sports during his senior year.[16] The challenged rule permitted students to remain eligible for participation only for four consecutive school years. The plaintiff previously repeated the ninth grade and did not participate in sports during the tenth grade, although he did play during both years in the ninth grade and one year in the eleventh grade. As a result, the four consecutive year requirement had expired, while the student nevertheless wanted to have four full years of eligibility. Such a practice generally is disallowed because, if it were not, many students would similarly "redshirt" themselves, thereby permitting them to gain both physical and emotional maturity and giving them a comparative advantage in their respective sports. Furthermore, athletic associations tend to permit exceptions to related requirements only when circumstances beyond the control of the student and parents result in limiting the student's participation. Academic performance did not qualify, according to the association, and the exception request was denied. The state supreme court (a trial court) upheld the decision of the association.

Outside Participation

The New York Court of Appeals was asked to decide whether a high school athletic association rule prohibiting outside competition was in violation of the first, ninth, and fourteenth amendments.[17] The rule forbade participation in nonschool sport contests once the student had participated in the first interschool contest of any of the enumerated sports. The petitioners argued that the rule unconstitutionally interfered with parental rights to control the upbringing of their children. The state high court upheld the reasoning of the supreme court (appellate division), which disagreed with the parents' claim and noted that they still could determine whether their children were to play on school or nonschool teams. Rather, the court concluded that a legitimate state interest existed in ensuring that the students did not overtax themselves. Furthermore, the court noted that all sports did not have to be included in the policy for it to meet constitutional scrutiny and opined that "[e]qual protection does not require that all classifications be made with mathematical precision."[18]

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[15] Mifflin County School Dist. v. Monsell, 504 A.2d 1357 (Pa. Commw. Ct. 1986).

[16] Pratt v. New York State Pub. High School, 507 N.Y.S.2d 793 (Sup. Ct. 1986).

[17] Eastern New York Youth Soccer Ass'n v. New York State Pub. High School Athletic Ass'n Inc., 499 N.Y.S.2d 671 (N.Y. 1986).

Residency

The Ohio High School Athletic Association maintains a bylaw barring nonresident students (i.e., students not residing within the district) from participating in Ohio interscholastic sports.[19] This rule applies to state and nonstate residents, and to public and private schools. Residents from Kentucky were denied the right to participate at a private school and filed suit claiming a violation of the privileges and immunities clause of the Constitution (article IV, section 2, clause 1). In developing its rationale, the Sixth Circuit Court of Appeals applied a two-pronged test developed by the Supreme Court: first, whether the challenged act burdened one of the privileges and immunities protected by the clause; and second, if so, whether there was justification for the discrimination.[20] In answering the first question, the court stated that "[a]lthough interscholastic sports importantly promote opportunities for growth, leadership, and responsibility among students, we can find no way in which the right to participate in interscholastic sports is fundamental or basic to the nation's vitality or interstate harmony."[21] Because sports participation was not found to qualify under the privileges and immunities clause, the court was not then required to answer the second question and simply affirmed the right of the association to enforce the bylaw.

Transfer

The first of four transfer cases was decided by the Sixth Circuit Court of Appeals and involved two university football players.[22] Both received scholarships to a Division I university, but withdrew from the team for personal reasons. One student later applied to another Division I school, while the other applied to a Division III school. Under NCAA regulations a student-athlete transferring from one Division I school to another is not eligible to participate in NCAA sports at the new school for one academic year. Also of importance was an NCAA rule mandating that an athlete's eligibility must be completed within five calendar years from the time the athlete first enrolled in college. Had the first transferring student set out one year, as required by the first regulation, he still would have been ineligible due to the second regulation. On the other hand, the second student applied to a Division III school and also wanted to continue to play football. To be exempt from the aforestated transfer rule, a student transferring from a Division I school to a Division III school need only acquire a written release from his former school. However, the former school refused to provide such a waiver unless it received the request from the institution to which the student had transferred. Given the above situations, the students were denied the opportunity to participate and filed suit claiming first and fourteenth amendment violations. The circuit court supported the NCAA in its efforts to enforce these regulations and concluded that actions of the NCAA were not "state actions" for section 1983 purposes. Furthermore, the court ruled that the university and its officials were protected from damage claims by the eleventh amendment.

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[18] *Id.* at 295.
[19] Alerding v. Ohio High School Athletic Ass'n, 779 F.2d 315 (6th Cir. 1985).
[20] *Id.* at 316.
[21] *Id.* at 317.
[22] Graham v. NCAA, 804 F.2d 953 (6th Cir. 1986).

A second transfer case emanated from Texas and involved a high school football player who was denied the opportunity to play during his senior year at the school to which he transferred.[23] The basis to the denial was a university interscholastic league rule that mandated that a student who changes schools for athletic purposes is not eligible to compete in varsity league athletic contests at the school to which he moves for at least one calendar year. The student claimed that he had not moved for athletic purposes and requested a second hearing before "neutral" persons. Such a hearing was provided, but the original decision to deny the opportunity to participate was confirmed. The student then filed suit. The trial court enjoined the board from preventing him from playing football his senior year. On appeal, the appeals court ruled the case to be moot since the student already had played the entire season and since he had graduated from high school.

The next transfer case involved a high school student who had transferred from a private school to a public school during the summer following his sophomore year, but had not changed his residence.[24] As in the other transfer cases, the student was denied the opportunity to participate in interscholastic sports. The trial court denied the student's petition and a

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[23] University Interscholastic League v. Jones, 715 S.W.2d 759 (Tex. Civ. App. 1986).
[24] Steffes v. California Interscholastic Fed'n, 222 Cal. Rptr. 355 (Ct. App. 1986).

California appeals court affirmed. At the appeals level it was noted that the right to participate in interscholastic athletics was not a fundamental right requiring strict scrutiny, and that the rule forbidding the plaintiff's participation was rationally related to a legitimate state purpose of preventing both recruitment by coaches and "shopping" by athletes.

In the fourth and final transfer controversy litigated in 1986, several students challenged a transfer provision similar to those discussed above.[25] The trial court granted summary judgment to the association that promulgated the controversial regulation and the case was appealed. On appeal, the court held the rule to be rationally related to a legitimate regulatory purpose of discouraging athletic recruitment and therefore not in violation of equal protection. Furthermore, the court observed that the association's refusal to conduct a hearing regarding waiver of the rule or to provide an appeal from that decision, did not deprive the students of due process.

EQUALITY OF PROGRAMS

In a student case from Montana, high school girls claimed sex discrimination in secondary athletic programs.[26] The Montana District Court concluded that the program was not equitable with respect to provision of sports opportunities for male and female students and therefore violated both title IX and the state constitution, but that the seasonal alignment of basketball and volleyball outside the national norm did not deprive the plaintiffs of any constitutional right. Also, the court observed that equity had not yet been realized with respect to access to prime practice time, access to equally desirable facilities, team support, provision of junior varsity and younger level teams for girls' sports, and the number of sport offerings. The court went on to note that the participation of females in sports would best be served by the continuing efforts of the Montana High School Association, the Office of Public Instruction, and local administrators in their efforts to survey and accommodate the interests and abilities of such athletes.

A second sex discrimination case was appealed to the Fifth Circuit Court of Appeals and involved female students who brought a class action alleging a title IX violation by West Texas State University in its athletic programs.[27] The appellants argued that the program was a recipient of federal financial assistance because student athletes who received federal funds used them in part to pay mandatory student fees which supported activities of the department. Furthermore, the appellants proposed that the discrimination within the department was so infectious that it imputed to other departments that directly received federal assistance. The circuit court supported neither of these rationales and concluded that the athletic program was not covered by title IX.

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[25] Berschback v. Grosse Pointe Pub. School Dist., 397 N.W.2d 234 (Mich. Ct. App. 1986).

[26] Ridgeway v. Montana High School Ass'n, 633 F. Supp. 1564 (D. Mont. 1986).

[27] Bennett v. West Texas State Univ., 799 F.2d 155 (5th Cir. 1986).

ENFORCEMENT OF RULES

In a Texas Supreme Court case, the University Interscholastic League (UIL), pursuant to established rules, declared a baseball team the winner of its playoff series even though only one of three scheduled games had been played due to the others being rained-out.[28] As a result of this decision, the school that lost the one game was out of postseason play and filed suit challenging the UIL decision. The state high court held that neither due process nor equal protection rights were violated by the decision.

TORT

In 1986, there were twenty-four tort cases: four intentional; eighteen negligence; two product liability. Related disputes varied considerably and included cases involving athletes, cheerleaders, spectators, and officials.

Intentional

Assault. The first of four intentional tort cases involved the assault of a football game referee by a game spectator in Louisiana.[29] The suit, however, was not filed agaainst the man who caused the injury, but rather was filed against the high school and its principal. The trial court dismissed the complaint for failure to state a cause of action and also denied the plaintiff the right to amend the petition. The plaintiff appealed the decision to the state court of appeals. The complaint alleged negligence on the part of the defendants for failing to properly and adequately investigate the lessors of the stadium and for allowing alcoholic beverages to be served on its premises without adequate crowd control personnel, procedures, and facilities. The lower court decision on behalf of the high school and principal was affirmed on appeal.

The second related case involved a university athlete who alleged assault and battery, intentional interference with contract (scholarship), misrepresentation, and breach of contract, among others.[30] The plaintiff alleged that his football coach grabbed and shook his face mask, called him obscenities, and struck him. Furthermore, he claimed to have been forced to leave the university as a result of constant mental and physical abuse by the coach and his assistant. The trial court ruled on behalf of the university and the former player appealed. The state court of appeals affirmed the lower court decision as well as the awarding of attorneys' fees to the university.

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[28] Eanes Indep. School Dist. v. Logue, 712 S.W.2d 741 (Tex. 1986).

[29] Litomisky v. St. Charles High School, 482 So. 2d 30 (La. Ct. App. 1986).

[30] Rutledge v. Arizona Bd. of Regents, 711 P.2d 1207 (Ariz. Ct. App. 1985).

Libel. The next intentional tort case also involved the game of football, but, this time, libel was claimed when a newspaper article was published claiming that the coach "showed himself to be a big loser" and had "cursed and belittled his players," with particular abuse directed toward the quarterback after he had thrown numerous interceptions.[31] The coach contended that the article was incorrect and that he had not used abusive, vulgar, or profane language toward his players. In his support were several fans, officials, spectators, and players, including the allegedly abused quarterback. The jury returned a verdict in favor of the plaintiff for both compensatory and punitive damages; that decision was appealed to the state supreme court (appellate division). On appeal, the defendant argued that the evidence was insufficient to establish that the article was defamatory or that it was published with malice. The court in part disagreed and concluded that the defamatory statements about the plaintiff were intentionally and recklessly distorted. Accordingly, the compensatory damage award was ruled to be justified. However, the court did not support the common-law malice claim, thereby negating the award of punitive damages.

In the final intentional tort case of 1986, the Supreme Court of Ohio reviewed a case brought by a superintendent against a newspaper.[32] An article in the paper accused him of committing perjury at a hearing of the Ohio High School Athletic Association regarding a fight which occurred at a high school wrestling match. The trial court had entered summary judgment in favor of the newspaper and the superintendent appealed. The court of appeals affirmed the lower court decision, as did the state supreme court. The high court held that the superintendent was a "public official" for purposes of defamation law and that the opinions stated in the article were protected by both the federal and state constitutions.

Negligence

Negligence cases litigated in 1986 can be grouped into four categories: suits from participants, cheerleaders, and officials who were injured while participating or practicing; suits from spectators who were injured while in attendance; suits from participants who were injured while enroute to a game; and a suit alleging vicarious liability.

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[31] Mahoney v. Adirondack Publishing Co., 509 N.Y.S.2d 193 (N.Y. App. Div. 1986).
[32] Scott v. News-Herald, 496 N.E.2d 699 (Ohio 1986).

Participants. Seven cases involved students who were injured while participating in sports (two in football, two in baseball, one in rugby, one in lacrosse, one in wrestling); one additional case involved a volunteer sideline official. Furthermore, four other cases were brought by persons injured during required practices (one in cheerleading, one in rowing, one in gymnastics, one in football).

The injury sustained by a football player was not one he had assumed the risk of incurring: he was shot during the game. As a result, he claimed negligence as well as violations of the due process clause and section 1983. The complaint was filed against school officials. The trial court dismissed the complaint and the First Circuit Court of Appeals affirmed.[33] The circuit court reasoned that the complaint failed to state a cause of action, given that it alleged no more than simple negligence and that the defendants were not directly responsible for security at the athletic field.

In a second case, a football player left the rest of his team and coach to go to the cafeteria area where he could call his father for a ride home.[34] While there he was attacked and beaten by three fellow students. The injured student sued school officials claiming negligent supervision. A Florida circuit court ruled on behalf of the plaintiff and the school board appealed. The appeals court affirmed the lower court decision and held that the school breached its duty to provide adequate security to its students, given the recognition by school officials that there was a need (1) to patrol and supervise the school grounds and (2) to prevent students from being left alone on campus either during the school day or during after-school activities.

In the first of two baseball-related injury cases, the court ruled that the city board had not waived its immunity from suit with regard to injuries sustained by participants in athletic contests.[35] In the second case, the state appeals court concluded that whether a school district had breached its duty, and whether the outfielder had assumed the risk of participation, were genuine issues of material fact precluding summary judgment.[36]

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[33] Williams v. City of Boston, 784 F.2d 430 (1st Cir. 1986).
[34] Broward County School Bd. v. Ruiz, 493 So. 2d 474 (Fla. Dist. Ct. App. 1986).
[35] Overcash v. Statesville City Bd. of Educ., 348 S.E.2d 524 (N.C. Ct. App. 1986).
[36] Beckett v. Clinton Prairie School Corp., 494 N.E.2d 988 (Ind. Ct. App. 1986).

In an Illinois appeals court case, a rugby player was injured during a game and brought action against a private religious high school athletic league claiming negligence and willful and wanton conduct.[37] The trial court had granted the league's motion to dismiss a part of the complaint and the appeals court affirmed. The appeals court based its position on the fact that the league had not assumed the responsibility for regulating the nonleague sport of rugby, for providing or requiring protective equipment, or for establishing minimum qualifications or training for athletic coaches. Accordingly, the defendant did not have the "duty" to protect the student. Without such a showing the plaintiff failed to state a cause of action for negligence.

The lacrosse case was brought by a player from a visiting team who had incurred serious back injuries while participating in a game.[38] In this Ohio Supreme Court case, the player sued the university under the doctrine of *respondeat superior*. The state high court ruled that the student who caused the injury was not an agent of the university so as to impose liability and that an illegally parked car that caused a delay in the arrival of the ambulance and medical personnel also did not render the institution liable.

In a case involving injury to a wrestler, the hospital filed suit against the county for payment of the bill, while the county sued the insurer which issued a group accident medical policy to the athletic association. The court ruled that the insurer was responsible for paying the student's hospital bill up to the recovery ceiling of $100,000.[39]

A Connecticut case involved a spectator who was injured while serving as a sideline official at a high school football game.[40] He was run into by a player. The state appeals court ruled that the town and school board were immune from liability on the negligence claim and that the spectator could not recover under the theory of public or private nuisance.

In addition to those cases identified above, four negligence cases were brought by individuals injured in practice or while training. In the first case, a cheerleader claimed that her injury, which resulted from a fall on school property after school hours, was a result of inadequate supervision.[41] Notwithstanding the assertion, the appeals court held the school district to be immune from such suits under state tort law.

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[37] Perkaus v. Chicago Catholic High School Athletic League, 488 N.E.2d 623 (Ill. App. Ct. 1986).

[38] Hanson v. Kynast, 494 N.E.2d 1091 (Ohio 1986).

[39] Coconino County v. Fund Admr's Ass'n, Inc., 719 P.2d 693 (Ariz. Ct. App. 1986).

[40] Couture v. Board of Educ., 505 A.2d 432 (Conn. Ct. App. 1986).

[41] Messina v. Blairsville-Saltsburg School Dist., 503 A.2d 89 (Pa. Commw. Ct., 1986).

A second training-related case was filed by a girl who fell from the bench on which she was exercising while training for a position on the school's rowing crew.[42] The court noted that the uneven bench apparently had been responsible for the fall of another girl earlier in the day, and that no one was assigned the responsibility of "spoting" the students as they performed their exercises. The trial court granted a directed verdict to the district and the plaintiff appealed. On appeal, the court decided to reverse and remand, stating that the jury must decide whether the coach had properly positioned the board and whether adequate supervision existed at the time the injury occurred.

In the third training-related case, an injured gymnast brought action against her coach and school district claiming a violation of state tort law.[43] On appeal to the Iowa Supreme Court, the issue became whether the student's father had complied with the statutory notice provisions of the law. The state high court ruled that the father had met the requirement when he requested reimbursement for the ambulance service within the statutory time period.

In the final case in this subsection, a student sustained injuries which resulted in quadriplegia while engaging in a tackling drill during football practice.[44] He filed suit in a Massachusetts state court. On appeal, the court ruled that the coach could be held responsible for misfeasance, but not for nonfeasance; that the town was protected by governmental immunity; and that the plaintiff could not be regarded as an employee of the town for workers' compensation purposes.

Spectators. Three cases in 1986 were filed by persons who were injured while in attendance at sporting events. The first case was filed by the parents of an infant who was injured when struck by a baseball overthrown at first base.[45] The plaintiffs averred that defendants had failed to maintain, design, and supervise the field properly; failed to locate the spectators' seating area in a safe place; and failed to install proper protective shields or nets, among other charges. The district claimed immunity, and the trial court agreed and granted summary judgment. On appeal, the court ruled that the school district of the visiting team was not liable and that the electric company which leased the field to the parks commission was protected by the Recreation Use of Land and Water Act. However, the appeals court remanded the case to determine whether the home school district "possessed" the baseball field and whether the "real property" exception in tort law would therefore apply.

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[42] Hornyak v. Pomfret School, 783 F.2d 284 (1st Cir. 1986).

[43] Oliver v. Sioux City Community School Dist., 389 N.W.2d 665 (Iowa 1986).

[44] Marcy v. Town of Saugus, 495 N.E.2d 569 (Mass. App. Ct. 1986).

[45] Lowman v. Indiana Area School Dist., 507 A.2d 1270 (Pa. Commw. Ct. 1986).

The next related case emanated from Texas and involved a spectator who was injured when the school bleachers collapsed while she was watching a basketball game.[46] The appeals court ruled the game to be a governmental function, rather than proprietary, and accordingly concluded that the district maintained immunity in such claims.

In the final spectator case, the injured person was struck by a goalpost which had been pulled down at the conclusion of a college football game.[47] The plaintiff alleged negligence and the creation of a public nuisance. The United States District Court of Connecticut ruled that the stadium was private property and therefore was not subject to suit under public nuisance. However, issues of material fact regarding whether the city and its officers had breached a ministerial duty owed to the spectators had not been resolved and therefore summary judgment was precluded.

Enroute to Game. The first of two cases under this subtopic involved suit against a state university and other officials (1) for negligence causing the death of a student who was killed in an airplane crash, and (2) for breach of contract for failure to insure the student's life.[48] A court of appeals in Tennessee held that the university and its officials were protected by the doctrine of sovereign immunity from liability for such negligence and contract claims.

In the second case, a van carrying the university wrestling team was involved in an accident.[49] The van had been loaned to the university and was driven by the coach. The suit was filed by the owner of the van and his insurer in an effort to acquire declaration that the insurer had no duty to defend or indemnify the university coach or the state for liability claims of third persons arising out of the accident. The Court of Appeals of Oregon ruled that the van owner's policy, as written, did in fact require the insurer to defend and indemnify the state and the coach. Furthermore, the state statute that prohibited state agencies from purchasing liability insurance except as authorized by law did not preclude the state from taking advantage of the van owner's policy.

Vicarious Liability. In an unusual case, the estate of a decedent shot by an intoxicated person brought both a dramshop action and a negligence action against the defendant school district and others.[50] Plaintiffs alleged that the school district's agent, an athletic booster organization, served alcoholic beverages to a visibly intoxicated person who later killed plaintiff's decedent as well as himself. The Court of Appeals of Michigan held that the school district could be held vicariously liable under the dramshop provision of state law, but that no common-law action existed.

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[46] Gravely v. Lewisville Indep. School Dist., 401 S.W.2d 956 (Tex. Ct. App. 1986).
[47] Cimino v. Yale Univ., 638 F. Supp. 952 (D. Conn. 1986).
[48] Greenhill v. Carpenter, 719 S.W.2d 268 (Tex. Ct. App. 1986).
[49] Fircrest Poultry Farms Co. v. State, 728 P.2d 968 (Or. Ct. App. 1986).

Products Liability

In the first of two related cases, a former high school football player was injured and filed suit against both the manufacturer of his helmet for products liability and a physician for medical malpractice.[51] The plaintiff was a resident of Ohio and was injured in a game played in that state. However, he was treated by a physician in Michigan and filed suit in that state. On appeal, the Michigan Court of Appeals held that the trial court had not abused its discretion either in severing the two claims or in determining that Ohio, rather than Michigan, was the proper forum for the products liability claim against the manufacturer.

In the final tort case, an Illinois appellate court reviewed a case filed by a high school football player who suffered a fracture of the cervical spine when tackling an opponent during a game.[52] The suit was brought against the helmet manufacturer and retail seller. The court held that the football helmet was not defective because it did not carry a warning that it would protect against injuries to the cervical spine which might result in quadriplegia or death. In reaching its decision, the court also observed that the plaintiff had been properly instructed on how to tackle and was aware that he could be injured if his head was the initial point of impact.

EMPLOYMENT

Adverse Employment Decisions

Nine cases involved the dismissal, nonrenewal, or transfer of coaches or athletic directors: immorality (one), incompetency (one), insubordination (two), length of contract (two), neglect of duty (one), resignation (one), and transfer (one).

Immorality. In a Missouri case, two teachers/wrestling coaches were dismissed by the school board for their conduct at a wrestling tournament.[53] They were responsible for chaperoning six athletes, while a mother of one of the cheerleaders was responsible for chaperoning four cheerleaders. The groups were assigned to two different motels. The chaperons spent most of their evening hours drinking in the motel bar and later went to a friend's house where a party was taking place. During their absence, several students left the motel without permission, beer was brought into the motel room, and both groups of students eventually gathered in the room reserved for the wrestlers. The chaperons returned to the rooms at approximately 1:30 a.m. They claimed they were unable to arouse the sleeping cheerleaders in order for them to return to their quarters, so a decision was made to permit them to stay together. The teachers claimed that the decision was based on the late hour, the weather, the intoxication of the female chaperon who would be responsible for driving the students, and the female chaperon's lack of familiarity with the vehicle she was driving. Following this decision, one of the coaches and the female chaperon proceeded to occupy one of the beds in one of the rooms, while the other coach and one of the cheerleaders occupied the other bed in the same room. Several students slept in the room with the chaperons, while several others stayed in an adjoining room. The next morning all involved parties agreed not to discuss the events of the prior evening. Notwithstanding this agreement, the teachers' supervisor learned of the incident approximately one month later. This information was the basis for a decision to terminate the employment of the coaches. The coaches sued claiming that the incident did not render them unfit to teach. The Missouri Court of Appeals disagreed and concluded that the evidence was sufficient to support both the charge of immorality and the conclusion that they were unfit to teach.

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[50] Kerry v. Turnage, 397 N.W.2d 543 (Mich. Ct. App. 1986).
[51] Jemaa v. MacGregor Athletic Prod., 390 N.W.2d 180 (Mich. Ct. App. 1986).
[52] Lister v. Bill Kelley Athletic, Inc., 485 N.E.2d 483 (Ill. App. Ct. 1985).

Incompetency. The Supreme Court of Appeals of West Virginia was responsible for review of the lone incompetency case of 1986 involving coaches.[54] In that case, a head football coach was dismissed from his coaching responsibilities, but was retained as a teacher. On appeal to the state superintendent, the decision of the local board and superintendent to nonrenew the coaching contract was reversed, because the reasons for nonrenewal were not adequately proven. That decision, however, was reversed by a state circuit court, which concluded that state procedural requirements did not apply in a case involving nonrenewal of a contract for extracurricular duties. On further appeal to the supreme court of appeals, the lower court decision was reversed; the appeals court ruled that the procedural protections did in fact apply and that the coach was entitled to reinstatement because he had not been afforded a written evaluation and an opportunity to improve.

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[53] Schmidt v. Board of Educ., 712 S.W.2d 45 (Mo. Ct. App. 1986).
[54] Hosaflook v. Nestor, 346 S.E.2d 798 (W. Va. 1986).

Insubordination. In 1986, there were two cases involving the insubordination of a coach and an athletic director: the first from Kansas, the second from Mississippi. In the Kansas case, the school district brought a declaratory judgment action against a tenured teacher and union seeking a determination that the teacher's refusal to accept extra duty (i.e., the coaching of basketball) amounted to insubordination and was a breach of contract.[55] The district court entered judgment for the district and appeal was made to the Court of Appeals of Kansas. That court held that a teacher may not have a primary contract terminated for refusal to accept a supplemental contract.

In the Mississippi case, an athletic director was dismissed based on insubordination, direct disobedience of board policy, unauthorized expenditures, and numerous inappropriate budgetary decisions.[56] The coach claimed a violation of due process because he had not been informed of each of the specific improprieties. The court noted, however, that the charges brought against the plaintiff were broad in nature and met the notice requirement. Furthermore, the court observed that school boards were not courts and therefore were not bound by the Mississippi Rules of Evidence.

Length of Contract. The first of two length of contract disputes was resolved by the Court of Appeals of Minnesota.[57] In that case, a teacher had coached basektball for ten years, based on successive one-year contracts. Following the expiration of the last contract, the board voted not to renew, but gave no reason other than that the prior contract had expired. That decision was upheld by a hearing officer following an administrative appeal. After that appeal, the plaintiff filed suit. The state appeals court ruled that the failure to renew the coaching contract was not a termination giving rise to notice and hearing requirements and that the reason for nonrenewal provided by the board was adequate.

The second case in which length of contract was disputed involved a coach whose contract was terminated and later claimed breach of contract, fraud, intentional interference with advantageous business relationships, and intentional infliction of emotional distress.[58] The defendants moved for summary judgment and the lower court granted the motion except for plaintiff's breach of contract and fraud counts. On appeal, the University of Arizona (the petitioner) argued that the alleged multi-year contract with the coach was for more than one year and, as a result, violated state law and therefore was void and unenforceable. The court disagreed and concluded that multi-year contracts are possible in selected circumstances and that the contract in question was legal and enforceable.

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[55] Unified School Dist. No. 241 v. Swanson, 717 P.2d 526 (Kan. Ct. App. 1986).

[56] Merchant v. Board of Trustees, 492 So. 2d 959 (Miss. 1986).

[57] Hahn, *In re*, 386 N.W.2d 789 (Minn. Ct. App. 1986).

[58] University of Ariz. v. Pima County, 722 P.2d 352 (Ariz. Ct. App. 1986).

Neglect of Duty. In a case similar to that discussed under "immorality," a female teacher was responsible for chaperoning several cheerleaders, some of whom were under legal age to consume alcohol.[59] Nevertheless, she permitted them to drink beer at their motel room, and even drank with them. When this incident was communicated to school officials, steps were taken to dismiss the teacher based on neglect of duty. The teacher then administratively appealed the dismissal decision to a hearing officer. The hearing officer recommended that the teacher be retained. Notwithstanding the above, the Colorado Court of Appeals ruled that the school board may adopt a hearing officer's findings but still overrule the final recommendation. Given this conclusion, the court upheld the dismissal of the teacher.

Resignation. In an Alabama Supreme Court case, the appellant was a tenured teacher who also worked as a football coach.[60] He decided that he no longer wanted to serve as a coach and submitted a letter of resignation to the superintendent stating his intentions. The board of education later informed him that his proposed resignation as a coach would also be considered as a resignation from his tenured teaching position. Because he did not wish to lose his teaching position, he withdrew his letter of resignation and continued both teaching and coaching. The teacher then filed suit. The trial court granted the board's motion to dismiss and the teacher appealed. On appeal, the state high court ruled that the present controversy could be settled in a declaratory judgment action and remanded the case to the trial court to hold a hearing on the merits of the claim.

Transfer. In West Virginia, a teacher was dismissed from a coaching position without prior notice or a hearing.[61] The circuit court upheld the dismissal and the teacher appealed. The supreme court of appeals held that state statute requiring separate contracts for teaching and coaching did not indicate that procedural due process did not have to be followed regarding extracurricular contracts. Furthermore, the board's refusal to renew the teacher's coaching position was a "transfer" subject to statutory procedural protections. Since such procedures were not followed, the plaintiff was entitled to reinstatement and back pay.

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[59] Blaine v. Moffat School Dist. No. 1, 709 P.2d 745 (Colo. Ct. App. 1985).
[60] Moss v. Williams, 489 So. 2d 575 (Ala. 1986).
[61] Smith v. Board of Educ., 341 S.E.2d 685 (W. Va. 1985).

Compensation

In a Florida case, a Public Employees Relations Commission (PERC) decision was challenged in state appeals court.[62] Contrary to a prior ruling, PERC's final order found that supplemental pay for coaching duties performed by teachers was a "wage" subject to collective bargaining under state law. The appeals court concluded that the PERC decision was proper.

Discrimination

In 1986, there were three race and three sex discrimination suits claiming violations under the fourteenth and first amendments, title VII, title IX, and sections 1981 and 1983.

Race. The first race discrimination case was heard by the Fifth Circuit Court of Appeals and dealt with the transfer of a high school head football coach/athletic director in Texas.[63] The coach (white) had a number of disagreements with his principal (black) including (1) the former's statements that he would never again use black officials in a game and that most of his athletes (the majority of whom were black) could not meet NCAA academic standards, and (2) his inability to deal with public controversies regarding bribery, a game plan that was not followed, and use of nonschool personnel in the booth. The principal wanted the coach removed due to his lack of leadership performance, lesson plan preparation, attendance at faculty meetings, and his aforestated comments. Following several reassignments, the former coach filed suit. Soon thereafter he was assigned to teach in another high school where he also was to serve as freshman football coach. The court ruled that the plaintiff had established a prima facie case of race discrimination, given that he was a member of a racial minority at his particular school; that he was exceptionally well qualified for the position; that the recommendation to replace him was made by a black principal; and that he was replaced by a black coach who was substantially less qualified. However, the defendant was able to effectively rebut the prima facie claim, given the nonrace-related concerns identified above. The inquiry then centered on whether the proferred reasons were a pretext to intentional discrimination. Sufficient evidence to support intentional discrimination was found to exist by the jury and that decision was upheld by the circuit court. The plaintiff also was successful in his first amendment free speech claim against the principal. His comment regarding the inability of his athletes to meet national standards was ruled to be a matter of public concern and therefore protected under the first amendment, even though the statement later was shown to be untrue.

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[62] School Bd. v. Levy County Educ. Ass'n, 492 So. 2d 1140 (Fla. Dist. Ct. App. 1986).

[63] Jett v. Dallas Indep. School Dist., 798 F.2d 748 (5th Cir. 1986).

In contrast to the above, the school district was not ruled to have violated section 1983, since the actions of the principal were not due to official action, policy, or custom and since it was not proven that the superintendent's decision to support the transfer recommendation was improperly motivated. Furthermore, neither section 1981 liability based on *respondeat superior* nor the due process and constructive discharge claims was found to be meritorious. The plaintiff's contract had not been terminated (he was transferred) and therefore he did not suffer a property loss. The case then was remanded to determine damages and attorneys' fees.

The second race discrimination case evolved from Arkansas and was reviewed by the Eighth Circuit Court of Appeals.[64] In that case, a black assistant basketball coach at the University of Arkansas, Little Rock, applied for the head coach position. A white male was hired, while the black assistant was not renewed for the following year. The plaintiff filed an EEOC complaint and later filed suit based on title VII, section 1983, and the first amendment. The district court dismissed the title VII charges against the chancellor and athletic director because they were not named in the EEOC complaint, and also dismissed the section 1983 charges because the appellant had failed to establish a prima facie case. Notwithstanding the above, the court concluded that the plaintiff had established a prima facie case of retaliatory discharge, but that the district court's order failed to provide sufficient facts to determine whether the appellees had articulated a legitimate nondiscriminatory reason for the discharge. Given the above, the case was remanded to enable the appellant to present evidence of pretext.

The final race-related case originated in Mississippi and involved a consent decree and its impact on three black educators, one of whom was a coach.[65] A federal district court concluded that the decree indicated that the coach was entitled to a head coaching position, but not necessarily to a head football coaching position.

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[64] Greenwood v. Ross, 778 F.2d 448 (8th Cir. 1985).

[65] United States v. Mississippi, 641 F. Supp. 232 (S.D. Miss. 1986).

Sex. The first employee sex discrimination case emanated from Nebraska, where a women's basketball coach was not rehired and claimed discrimination both in regard to the employment decision and to the nature of the employment (e.g., work load).[66] The coach had missed a national athletic association meeting, failed to send a team roster to tournament officials, arrived late to one basketball game, failed to get the team to other games on time, once scheduled varsity and junior varsity games for the same day in different cities, used an unauthorized assistant, left basketball practices unsupervised, recruited poorly, maintained poor staff relations, poorly organized team involvement in the high school invitational tournament, and failed to provide detail in expenses. As a result, her nontenured contract was nonrenewed. She then filed suit in federal district court claiming a violation of title IX and title VII. On appeal, the Eighth Circuit Court of Appeals upheld the lower court's decision rejecting plaintiff's inferences of pretext and concluding that title III funds for research did not qualify as federal financial assistance for title IX purposes in this instance, given that intercollegiate sports did not constitute "academics."

The second employee sex discrimination case was filed in a federal district court in South Dakota and later was appealed to the Eighth Circuit Court of Appeals.[67] That case involved a female applicant for a teaching position that later was filled by a male who also could coach football. At the trial level, the jury ruled that the plaintiff had not been discriminated against based on sex. That decision was upheld on appeal by the circuit court where it was concluded that the district had a legitimate, nondiscriminatory reason for not hiring the applicant—the male was better qualified.

The final sex discrimination case involved a physical education teacher who alleged that she was unlawfully denied the right to become head football coach because of her sex.[68] The prior coach had worked under the assumption that he would remain coach for three years, even though he had the right, according to union contract, to sign only a one year contract given that he was a substitute teacher. After the first one year contract expired, the job became open. The plaintiff was the only person to apply and was hired. Later it was learned that the former coach assumed that the job was still his and argued that if the position technically were open, he also would have applied had he received notice of the vacancy. The plaintiff was the person who distributed the notices and remembered putting them into the respective mailboxes, but could not specifically remember putting one in the former coach's box. The federal district court ruled that the nonselection of the plaintiff was due to the fact that no vacancy in fact existed and not to the fact that plaintiff was a woman.

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[66] O'Connor v. Peru State College, 781 F.2d 632 (8th Cir. 1986).
[67] Grebin v. Sioux Falls Indep. School Dist. No. 49-5, 779 F.2d 18 (8th Cir. 1985).
[68] Oates v. District of Columbia, 647 F. Supp. 1079 (D.D.C. 1986).

Distributor Contracts

In a case from Arizona, a former university basketball coach sued an athletic shoe distributor for money allegedly due under an oral contract.[69] Plaintiff argued that he was to be paid an advisory and consultation fee of $30,000 in return for his commitment to have the members of the team wear Adidas shoes. The oral agreement did not include a provision regarding the contract continuation if the coach were to resign or have his contract terminated. The coach did in fact have his employment terminated, but still demanded that the shoe distributor continue to make payments pursuant to the oral agreement. The company refused and suit was filed. A federal district court held that the plaintiff's termination as coach was a sufficient basis for voiding the agreement. (It also was interesting to note that the plaintiff's successor entered into a similar advisory contract with a shoe company—Nike.)

Miscellaneous

Discipline of Nonparticipants

In a Kansas case, students had been suspended for three days for their admitted vandalism of school property.[70] The suspension included athletic events in addition to classes. The students and their parents sued claiming a violation of due process. The Kansas District Court held that adequate due process had been provided the disciplined students and that attendance of athletic games was not a constitutionally protected student right. Furthermore, the court concluded that the parents lacked standing to assert their own due process rights.

Media

In 1986 yet another case from Oklahoma involving the right to broadcast Big Eight Football games was heard by a federal district court.[71] In the instant case, an antitrust action was brought by the Independent Television Stations, Inc. and the Sports View Company against the College Football Association, the Big Eight Football Conference, ABC Sports, Inc., and Entertainment and Sports Programming Network, Inc. The complaint alleged price fixing, limited output, and monopoly. The trial court ruled that genuine issues of material fact precluded summary judgment and denied plaintiff's motion.

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[69] Lindsey v. Closco, 642 F. Supp. 250 (D. Ariz. 1986).
[70] Boster v. Philpot, 645 F. Supp. 798 (D. Kan. 1986).

Open Meetings

In a Maryland case, a newspaper publisher brought action against a university board of regents to obtain access to subcommittee meetings dealing with the academic achievement of student-athletes.[72] The committee was convened as a result of investigation of the cocaine-related death of a basketball player, Leonard Bias. The state circuit court had denied the injunction against the closed meetings and appeal was made. The Court of Special Appeals of Maryland held that the task force was not a "public body" within the meaning of the open meeting law and therefore was not required to allow the public to attend its meetings. Furthermore, the court ruled that the newspaper publisher did not have a free speech right under either the state or federal constitutions to attend the subcommittee meetings.

Public Records

The Supreme Court of Georgia reviewed the only 1986 sports case involving the disclosure of records prepared by a private athletic association.[73] In that case, a newspaper representative had requested disclosure of materials showing income, expenses, assets, and liabilities of a university athletic association. The trial court dismissed the complaint and the newspaper appealed. The state supreme court reversed (in part), holding that such records were "public records" under the state Open Records Act, and therefore were subject to disclosure.

Workers' Compensation

In the sole workers' compensation case involving student athletes, a California appeals court was asked to decide whether a varsity college athlete who had been a recipient of an athletic scholarship was eligible for benefits for injuries allegedly sustained while playing football.[74] The workers' compensation judge held that the athlete was an employee of the university and therefore eligible for benefits. However, that decision was reconsidered by the Workers' Compensation Appeals Board which ruled that the athlete was not an employee. The appeals board decision then was challenged in court. The appeals court concluded that the athlete did not have a vested right in employee status at the time of his injury and that a legislative declaration excluding athletes as employees for purposes of workers' compensation was not unconstitutional, even if done retroactively.

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[71] Association of Indep. T.V. v. College Football Ass'n, 637 F. Supp. 1289 (W.D. Okla. 1986).

[72] A.S. Abell Publishing Co. v. Board of Regents, 514 A.2d 25 (Md. Ct. Spec. App. 1986).

[73] Macon Telegraph Publishing Co. v. Board of Regents, 350 S.E.2d 23 (Ga. 1986).

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[74] Graczyk v. Workers' Compensation Appeals Bd., 229 Cal. Rptr. 494 (Ct. App. 1986).

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7

FINANCE

Julie Underwood

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INTRODUCTION

The United States Supreme Court decided two cases in the area c school finance in 1986. It addressed student financial assistance under vocational rehabilitation program for tuition at a sectarian post secondary institution in Washington; it also decided a case challenging a stat finance program. Cases were heard by other courts in an attempt t follow recent United States Supreme Court cases in the areas of publi school personnel working in parochial schools, and the recovery o improperly spent federal funds. Some cases represent attempts by stat legislatures to implement, and by courts to interpret, taxpayer revo legislation and other creative efforts to curb the growth of governme spending. Several challenges to the use of funds for programs for hand capped children were presented to the Department of Education. An as always, there was continued litigation on the taxing and spending authority of school districts.

PUBLIC FUNDS FOR PRIVATE SCHOOLS

Numerous cases that dealt with public funding for private schools were heard this year. These cases involved establishment of religion claims. One case involved a district's attempts at compliance with *Aguilar v. Felton*[1] and *Grand Rapids School District v. Ball*,[2] both decided by the United States Supreme Court in 1985. The second case involved a school district allowing religious education classes to take place in the elementary schools immediately before and after school. While another case involved the placement of public university student teachers at private sectarian schools. The issue of the constitutionality of the South Dakota textbook loan program was decided. The Supreme Court addressed student financial assistance under a vocational rehabilitation program for tuition at a sectarian postsecondary institution in Washington, and the Fourth Circuit Court of Appeals reviewed a similar program in Virginia.

Each of these cases deals with a claim that the program or practice constitutes an establishment of religion in violation of the first amendment. The establishment clause provides that "Congress shall make no law respecting an establishment of religion."[3] The courts currently interpret this using the three prong analysis established in *Lemon v. Kurtzman*.[4] First, the program or practice must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, it must not foster an excessive government entanglement with religion.[5]

Use of Facilities

In 1985, the United States Supreme Court in *Aguilar v. Felton*,[6] found that using federal funds to send public school teachers and other professionals into religious schools for chapter 1 instruction violated the first amendment.[7] In an effort to implement the *Aguilar* decision, the Community School District 14 in Brooklyn adopted a plan to conduct chapter 1 classes for private school students in the public school facilities rather than sending public school teachers to the private school as had been their practice. Within this school district's attendance area is Beth Rachel, a private elementary school for girls affiliated with the Satmar Hasidic Jewish sect. The Hasidic faith enforces strict separation of the sexes, even in educational settings, and stresses separation from the mainstream of society. In an effort to accommodate these religious beliefs, the district's plan for providing services included separate classes for the Beth Rachel students within the public school. The classrooms were physically separated from the rest of the classrooms by doors constructed in the hallways. Only the girls from Beth Rachel received instruction in these rooms. The school provided separate instructors who were female and spoke Yiddish. The parents' association challenged the plan claiming a violation of the establishment clause.

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[1] 105 S. Ct. 3232 (1985); *see* The Yearbook of School Law 1986 at 198.

[2] 105 S. Ct. 3216; *see* The Yearbook of School Law 1986 at 196.

[3] U.S. Const. 1st Amend.

[4] 403 U.S. 602 (1971).

[5] *Id.* at 612-13.

[6] 105 S. Ct. 3232 (1985); *see* The Yearbook of School Law 1986 at 198.

[7] Lemon v. Kurtzman, 105 S. Ct. at 3236.

Using the *Lemon v. Kurtzman* analysis, the court found that the lengths to which the city went in accommodating the religious views were likely to be perceived as governmental support for the separatist tenets of the Hasidic faith.[8] Thus, to impressionable young minds it may appear that the school was endorsing not only separatism, but the derogatory rationale for separation expressed by some of the Hasidim. Thus, the plan had the primary effect of advancing religion, in that it gave the appearance of favoring Hasidism.[9] The court of appeals, therefore, reversed the district court's refusal to issue an injunction against the implementation of the plan.

In 1979, the Findlay Board of Education approved the rental of the elementary school buildings, either before or after school hours, to the Findlay Weekday Religious Council for $1. Religious classes were held by the group on a daily basis, but could not start any sooner than five minutes after dismissal and had to end no later than five minutes before classes began. In addition, some of the elementary school Parent Teacher Organizations had made direct contributions to the religious group organizing the classes. After August 1984, the schools no longer distributed information about the program in classes, nor did they collect registration forms, contribution envelopes, or permission slips as their previous practice had been. Plaintiff taxpayers contended that even after the schools' involvement had been limited, the practice of allowing the classes to take place in the building immediately before and after school violated the first amendment. More specifically, they claimed that (1) the program gave the perception of endorsement of religious instruction by the schools, (2) the compulsory attendance machinery provided students for religious instruction, (3) the financial contributions of the Parent Teacher Organizations advanced religion, and (4) the program constituted an entanglement of religion because school personnel were required to be on school premises during the times that religious instruction took place. A federal district court upheld all but one of the plaintiff's contentions.[10] The court noted that the practice of allowing religious instruction in the elementary schools immediately before and after school, because of the location, the timing, and the age of the children gave the appearance of endorsement of religious practices to impressionable young children.[11] Citing recent Supreme Court decisions, the court determined that this constituted a violation of the establishment clause. The court was not persuaded that the district's policy of allowing other groups to meet in the schools necessitated allowing the religious classes to meet. The court held that the school was not a public forum in the traditional sense, and that the school could still allow religious groups to meet at the school but not immediately before and after classes. The court, however, did not find that the contributions from the Parent Teacher Organizations were unconstitutional, noting only their size and the fact that not every state action which in some way benefits religious activities violates the establishment clause.[12]

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[8] Parents' Ass'n of P.S. 16 v. Quinones, 803 F.2d 1235 (2d Cir. 1986).

[9] 803 F.2d at 1241.

St. Cloud University, a university under the control of the Minnesota State University Board, adopted a policy which permitted students to fulfill their student teaching requirements at parochial schools if such schools met the criteria required of public schools. The university paid the participating parochial school for each student teacher and placed no limits on the participating school's use of the money. The university provided a supervisor who would make periodic on-site observations and evaluations of progress. Students were allowed to select the parochial placement, but were advised that "the student's participation in any religious aspect of the school is exclusively between the parochial school's personnel and the student teacher."[13] Three students were in parochial school placements when the practice was challenged on establishment of religion grounds. The Eighth Circuit Court of Appeals applied the traditional *Lemon v. Kurtzman* analysis and found that the policy violated the establishment clause, given that the practice's primary effect would benefit parochial schools. The policy provided a benefit to parochial schools in the form of funds with no strings attached and an opportunity to evaluate student teachers for future employment. In addition, as was true in *Grand Rapids School District v. Ball,*[14] the practice communicated a message of governmental endorsement of pervasively sectarian parochial schools and created the perception of a symbolic union between church and state in the minds of parochial school students. This perception of a union between church and state was given great weight by the court, especially since it was in view of the children.

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[10] Ford v. Manuel, 629 F. Supp. 771 (N.D. Ohio 1985).

[11] *Id.* at 779.

[12] *Id.*

[13] Stark v. St. Cloud State Univ., 802 F.2d 1046, 1047 (8th Cir. 1986).

[14] 105 S. Ct. 3232 (1985); *see* The Yearbook of School Law at 198.

Auxiliary Services, Textbooks, and Instructional Materials

The issue of the constitutionality of the South Dakota textbook loan statute was finally resolved in a federal district court case and a South Dakota Supreme Court case. The federal district court had earlier found that the statutes did not, on their face, violate the establishment clause.[15] The constitutionality of the statutes, however, still remained in question under the South Dakota Constitution. On certification of the issue to the South Dakota Supreme Court, the loan provisions were found to be in violation of the state constitution which provides that "[n]o appropriation of lands, money or other property or credits to aid any sectarian school shall ever be made by the state" (article VII, section 16), and "[n]o money or property of the state shall be given or appropriated for the benefit of any sectarian or religious society or institution." (article VI, section 3).[16] The court reiterated the right of the state to provide more restrictive requirements on the use of public funds to private sectarian institutions than are provided in the United States Constitution, and found the statute unconstitutional under the more restrictive state constitution even though the texts were provided to all children within the district.

Student Aid

A blind student who was pursuing a Bible studies degree at a Christian college was denied financial aid under a state vocational rehabilitation assistance program. The Washington Supreme Court held that the first amendment precluded aid to a student pursuing a program which would prepare him to be a minister.[17] In a unanimous opinion, the United States Supreme Court reversed the Washington Supreme Court's decision.[18] Once again the *Lemon v. Kurtzman* three prong analysis was applied. The Court found the purpose of the program (i.e., to assist the visually handicapped through the provision of vocational rehabilitation services) to be secular. The last two prongs of the analysis were dealt with together as the court looked at whether the financial assistance would be an "impermissible direct subsidy" to the sectarian institution. Since the funds went directly to the student, not to the institution, the decision to support religious education was made by the individual, not by the state. Thus, it did not violate the primary effect and entanglement prongs of the *Lemon v. Kurtzman* analysis. In sum, the Court held

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[15] Elbe v. Yankton Indep. School Dist. No. 63-3, 640 F. Supp. 1234 (D.S.D. 1986).

[16] *In re* Certification of a Question of Law, 372 N.W.2d 113 (S.D. 1985).

[17] Witters v. Commission for the Blind, 689 P.2d 53 (Wash. 1984).

[18] Witters v. Washington Dep't of Servs. for the Blind, 106 S. Ct. 748 (1986).

> it does not seem appropriate to view any aid ultimately flowing to the Inland Empire School of the Bible as resulting from a *state* action sponsoring or subsidizing religion. Nor does the mere circumstance that petitioner has chosen to use neutrally available state aid to help pay for his religious education confer any message of state endorsement of religion.[19]

A similar case was heard by the Fourth Circuit Court of Appeals.[20] A handicapped student wished to pursue a degree at a church-affiliated college outside the state of Virginia. While that state provides financial assistance to handicapped residents attending any college, the Attorney General had issued a formal opinion that the state constitution prohibited payment of state funds to church-affiliated colleges located outside the state. Accordingly, Phan's application for financial assistance was rejected. He sought individual relief alleging the in-state, out-of-state distinction was unreasonable. The federal district court dismissed his complaint and the Fourth Circuit Court of Appeals, in an opinion after *Witters*, vacated the dismissal. The state's justification for the differential treatment was based on the need to monitor the nature of religious affiliation. It was noted that the Virginia Constitution imposes a stricter interpretation on the prohibition of establishment of religion than does the United States Constitution. Thus, the court determined that the state did have a need to monitor the nature of the institution the student was attending. If it were more difficult to monitor out-of-state students than in-state students the court of appeals agreed that the distinction would stand. However, the record was incomplete as to the degree of monitoring of church-related schools the state maintained. Therefore, the case was remanded for further evidentiary findings.

Transportation

The only case reviewed in this section which does not contain an establishment of religion claim dealt with the interpretation of a Rhode

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[19] *Id* at 752-53.

[20] Phan v. Virginia, 806 F.2d 516 (4th Cir. 1986).

Island statute mandating local districts to pay for transportation for public and private school students. The statute in question provides in part, "[t]his chapter shall be construed . . . to create a state plan . . . to afford bus transportation to pupils who attend non-public non-profit schools which are consolidated, regionalized or otherwise established to serve residents of a specific area within the state."[21] The state was divided into five transportation regions and a district was required to provide transportation for students to schools which were also contained within its transportation region. Harnois petitioned Cumberland to provide bus transportation for her child to and from Mount St. Charles Academy. Cumberland refused, contending that the school did not fulfill the requirements of the statute because it was not a regional school, services were provided to more than one of the transportation regions, and out-of-state students were accepted. The court upheld the Commissioner of Education's interpretation of the statute, finding it irrelevant whether services were provided to students who lived in more than one transportation region or even out of state.[22] The court found that the school's newly amended articles of association showed that it was a "nonpublic, nonprofit school established to serve residents of a specific area within the state,"[23] in accordance with the statute. Thus, the school was found to be responsible for the student's transportation under the statute.

SOURCES AND ALLOCATIONS OF PUBLIC SCHOOL FUNDS

State School Finance Programs

Although the number of cases challenging state school finance systems has declined over recent years, it is still a significant field for judicial action in education law. This year the United States Supreme Court heard the first state finance program challenge since *San Antonio Independent School District v. Rodriguez*.[24] In addition, in California a third generation school finance case was decided;[25] a New York case challenged the use of voluntary taxpayer information in determining levels of state funding; the Massachusetts courts are continuing to deal with changes in state finance dictated by Proposition 2½; the Supreme Court of Michigan was asked to interpret taxpayer revolt legislation as it affects the Michigan school finance formulae; and an Idaho case dealt with the proper use of school land funds.

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[21] Gen. Laws 1956, § 16-21.1-1.

[22] Cumberland School Comm. v. Harnois, 499 A.2d 752 (R.I. 1985).

[23] *Id.* at 754.

[24] 411 U.S. 1 (1973).

[25] Serrano v. Priest, 226 Cal. Rptr. 584 (Dist. Ct. App. 1986).

In 1985, the Fifth Circuit Court of Appeals determined that an action brought by local school boards against the state was barred by the eleventh amendment.[26] The court decided that the dismissal of the complaint was proper since the differential funding was not unconstitutional under *San Antonio Independent School District v. Rodriguez*.[27] The granting of the writ of certiorari from this decision presented the United States Supreme Court with the opportunity to review a state's school finance program for the first time since *Rodriguez*. In *Papasan v. Allain*,[28] the plaintiffs argued that they received far less money per pupil than did other districts in the state. The argument, however, involved a rather complicated set of facts.

The school land grants in Mississippi in the early nineteenth century followed the pattern established by the federal government in the Land Ordinance of 1785. Section sixteen (and later, section thirty two) of each township was reserved to the states for public schools. In addition, Congress indemnified states for the school land sections which might be missing by allowing them to select lands to serve in lieu of the designated but unavailable lands. The lands on which the plaintiffs resided were not subject to the federal laws providing for the creation of the Mississippi Territory and for the sale and survey of its land because they were held at that time by the Chickasaw Indian Nation. Consequently, when these Indian lands were ceded to the United States in 1832, no section sixteen lands were reserved from the sale. To remedy this in 1836, Congress provided that property in lieu of section sixteen lands in the cession would be reserved for schools. In 1856, the state legislature sold these lands and invested the proceeds in loans to the state railroads. The state's investment was lost when the railroads were destroyed during the Civil War, and the investment principal was never replaced.

Under Mississippi law, all funds from section sixteen and lieu lands were allocated directly to the specific township to which those lands applied. In the counties created from the Chickasaw Cession, the state legislature paid the districts directly in the approximate amount of the original interest paid on the lieu land investment. In 1981, this amounted to an annual sum of $61,191 or $.63 per pupil; whereas, the average school land income in the rest of the state was about $75.34 per pupil. The controversy arose over the disparate funding level between those districts with regular school land income and those districts created from the Chickasaw Cession.

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[26] Papasan v. United States, 756 F.2d 1087 (5th Cir. 1985).
[27] 411 U.S. 1 (1973).
[28] 106 S. Ct. 2932 (1986).

In 1981, the school districts created from the Chickasaw Cession, and children within them, challenged the funding disparity by filing suit in the federal district court. Among their allegations was the argument that the disparities in the level of financial support between their school districts and the school districts with regular school land income, deprived the children in the former districts of a minimally adequate level of education and the equal protection of laws. The district court dismissed the complaints, and held that they were barred by the applicable statute of limitations and by the eleventh amendment. The Fifth Circuit Court of Appeals affirmed. Although it found the plaintiffs' equal protection claim would not be barred by the eleventh amendment, the dismissal of the complaint was found to be appropriate because the disparate funding was not unconstitutional under *Rodriguez*. The Supreme Court accepted certiorari and affirmed the court of appeals decision regarding the eleventh amendment immunity decision, but reversed on the equal protection issue and remanded the case for further factual findings on that issue.

For its analysis, the Court focused on the disparities in the land grant benefits as opposed to the broader questions of whether a minimally adequate education was a fundamental right and whether that alleged right had been violated. The Court noted that although the constitutional rights issues concerned remained unsettled, they did not require a resolution in the case.

According to the Court, *Rodriguez* dictated the appropriate standard of review for the equal protection claim, the rational relationship test. Under this level of scrutiny a state's action will be found constitutional if it bears a rational relationship to a legitimate state interest. Once this test was applied in the present case, the Court found that the plaintiffs may be able to substantiate their claim. Here the claim did not involve a challenge to the overall system of state school finance as in *Rodriguez*, but rather was limited to the disparities between the districts which had regular school land funds and those that did not. Furthermore, in *Rodriguez* the funding disparities arose from local decision regarding funds derived from local property taxes, while in *Papasan* the disparities arose directly from the state's decision involving the level of compensation for the lost principal to the Chickasaw Cession districts. Recognizing these differences, the Court concluded that the precedent set in *Rodriguez* did not necessarily resolve the equal protection issue in favor of the state in this case. It instead decided that the alleged facts provided a sufficient basis on which the plaintiffs could state a cause of action under an equal protection theory.

In summary, in the equal protection portion of *Papasan* the Supreme Court narrowed the ruling in *Rodriguez*. It stated that *Rodriguez* did not "purport to validate all funding variations that might result from a state's public school funding decision." Funding disparities may constitute an equal protection violation when it can be shown that they are not rationally related to a legitimate state interest. The Court could not pursue that issue further, because the district court had dismissed the claims without making the necessary factual determinations. Thus, the case was remanded for further proceedings on that point.

A third generation of a California school finance case may provide the beginning of one of the last chapters for the earlier wave of school finance litigation. This case predominantly presented compliance issues: what will be acceptable state responses to a court's determination that state school spending must be equalized? The issue to be decided was whether the school finance system was in compliance with the court mandated requirement that "wealth-related disparities in per pupil expenditures be reduced to insignificant differences."[29]

In the earlier case, the California Supreme Court found that the funding disparities between rich and poor districts violated the California Constitution.[30] The remedy decreed by the court was a reduction in the funding disparities between the districts to insignificant levels. More specifically that they be reduced to a $100 range. The basic question was whether for purposes of determining if compliance had been achieved, the court should focus on the phrase "insignificant differences" or on the $100 figure. The court determined that the proper compliance standard was whether the legislature had done all that was reasonably feasible to comply in reducing funding disparities to insignificant levels. Using this standard, the court concluded that California not only had met the standard, but had surpassed it.

Secondarily, the court was asked to again review the state finance system to determine if it violated the California Constitution. The court had to determine what unit of measure to use in determining fiscal equity. Based on the testimony of expert witnesses, the court determined the base revenue limit per pupil was the appropriate unit of measure. In selecting the base revenue limit per pupil in average daily attendance, the court excluded categorical aid and special need programs. The court noted that those are not wealth-related. In addition, they serve substantial and, indeed, compelling state ends in an appropriate, rational, and legitimate fashion.

In regard to the equity measure, the court noted that "no single measure of disparity permits accurate and comprehensive conclusions to be drawn about the equity of California's school finance system."[31] As such, the court accepted a number of measures of equity and heard testimony from a number of expert witnesses.

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[29] Serrano v. Priest III, 226 Cal. Rptr. 584, 601 (Dist. Ct. App. 1986).

[30] Serrano v. Priest II, 96 Cal. Rptr. 601 (Cal. 1971).

[31] Id. at 611.

In determining whether the current California system of school funding was in violation of the equal protection provision of the California Constitution, the court had to again adopt the proper standard for review. It reasoned that even though education might be considered a fundamental interest, not every statute that touches upon it should be subject to strict scrutiny nor should the legislature be required to justify every educational classification with a necessary and compelling state interest.[32] The court concluded that the standard of review for equal protection cases involving education is whether the funding disparities challenged by the plaintiffs bear a rational relationship to a "realistically conceivable legislative purpose." Applying this standard to the equity measures in evidence the court found the current pattern of funding the California public schools did not violate the state's equal protection provision, and noted that since the last litigation it had, in fact, "improved dramatically."

In a case from New York, taxpayers challenged the use of voluntary taxpayer information in determining the level of state funding for local districts.[33] In a series of legislative enactments between 1977 and 1982, the New York legislature developed a system whereby a major factor in the state appropriation formula for the local school districts was the gross income of the residents of each school district. State allocations to districts, to a great extent, were inversely proportional to the wealth of the resident taxpayers. To collect the income data, the State Tax Commission adopted regulations requiring taxpayers, by reference to a school district code number, to identify their resident district on their state income tax returns. Because of a confidentiality requirement contained in the tax code,[34] these data could not be independently verified. Thus, the resident school district given by the taxpayer was taken as accurate; if not provided, the data were not used. Because of taxpayer confusion or a deliberate attempt to thwart the system by the taxpayers, there were data relating to plaintiff district which were blatantly inaccurate. Taxpayers and the school district brought this action seeking a declaration that the practice was unconstitutional and contrary to statute in that it provided for formulae in calculation of state aid to school districts predicated upon inaccurate data. The New York Supreme Court, Suffolk County found that the legislature had the authority to calculate state school aid through a formula based on resident taxpayers' wealth, and that it could delegate the task of data collection to an administrative agency. However, it determined that the administrative agency failed to develop a system which was reasonably calculated to effectuate the purpose of the statute. As such, the practice was found to be contrary to the enacting legislation and therefore invalid. The court further upheld the plaintiff school districts' petition for retroactive application of a remedial statute which would provide accurate data for previous years. In sum, the court ordered the state to provide adjustments of all disbursements made for the school years 1980-81 through 1984-85 to the extent that they were based on any formula using invalid data gathering techniques.

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[32] Id. at 606.

[33] Dumain v. Carey, 499 N.Y.S.2d 334 (App. Div. 1986).

[34] N.Y. Tax Law § 697(e).

Proposition 2½ passed the Massachusetts legislature in 1980 and provided that any provision of law taking effect after January 1, 1981 which imposed direct services or costs on a city or town would be invalid unless during the same legislative session an appropriation from the state was provided for that cost.[35] In Massachusetts, funding for pupil transportation is provided through the state on a reimbursement basis, thus expenses incurred during one fiscal year are reimbursed in the next. In 1983, the legislature enacted a provision which extended the transportation obligations of cities and towns for transportation of private school students.[36] The Supreme Judicial Court of Massachusetts held that this was invalid under Proposition 2½ because funding was not provided in the same session for the direct obligation imposed on cities and towns.[37] In response in 1985, the legislature enacted a provision which appropriated over $55 million for reimbursement to cities and towns for expenditures for transportation of pupils pursuant to 1983 legislation.[38] The legislature further provided that any city or town which did not accept the provision of the 1983 legislation increasing the obligation for transportation of private school students, was ineligible for *any* reimbursement of *any* pupil transportation costs for 1986. The acceptance of this condition imposed additional financial obligations on the local districts since they would then have to comply with the increased services mandated by the 1983 legislation. Plaintiff Lexington estimated that compliance would cost an additional $55,000 for the 1985-86 school year; however, choosing not to comply would cost the district in excess of $200,000 for the same time period. This legislation was challenged as invalid under Proposition 2½ as providing additional financial obligations without concomitant financial support. The Supreme Judicial Court of Massachusetts held that the receipt of reimbursement by cities or towns conditioned on their acceptance of additional transportation obligations was not invalid.[39] The court found that the state could impose conditions on reimbursement for local obligations which existed prior to the effective date of Proposition 2½. The court accepted the legislature's authority to use that power as a way to force the cities and towns to accept the 1983 legislation and the increased obligations that went with it.

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[35] Mass. Gen. Laws ch. 29 § 27 (C).

[36] 1983 Mass. Acts 663.

[37] Lexington v. Commission of Educ., 473 N.E.2d 673 (Mass. 1985).

[38] 1985 Mass. Acts 140 (line item 7035-0004).

The Supreme Court of Michigan heard a consolidation of two cases with rather intricate procedural backgrounds both dealing with the effect of the state's taxpayer revolt legislation on the state school finance formulae.[40] The taxpayer legislation involved is contained in an amendment to the Michigan Constitution known as the Headlee Amendment.[41] It states in pertinent part:

> The state is hereby prohibited from reducing the state financed proportion of the necessary costs of any existing activity or service required of units of local government by state law.[42]
>
> Units of local government are hereby prohibited from levying any tax not authorized by law or charter when this section is ratified or from increasing the rate of an existing tax above that rate authorized by law or charter when this section is ratified. . . . If the assessed valuation of property as finally equalized . . . increases . . . the maximum authorized rate applied thereto in each unit local government shall be reduced to yield the same gross revenue from existing property . . . as could have been collected at the existing authorized rate on the prior assessed value.[43]

In the court's interpretation, these provisions, when enacted, were an effort to limit expansion of requirements placed on local government by the state, to freeze what they perceived was excessive government spending, and to lower their taxes both at the local and the state level.

The aforementioned affected school districts in Michigan that had increases in property values triggering the rollback provision in section 31 which necessitated a reduction in local tax effort. Under Michigan's form of state school finance, districts with lower levels of local effort received a lower percentage of their operating budget from state aid. In addition, those districts with high property values received a lower percentage of state aid, since the local effort required to generate the same amount of revenue is lower than districts with relatively low property values. Thus, since some districts were required to have smaller mill rates, they were receiving a lower percentage of their operating budget from state aid after the Headlee Amendment went into effect. The plaintiffs contended that this reduction in state aid was a violation of section 29 of the Headlee Amendment prohibiting reductions in "necessary costs of any existing activity or service required . . . by state law." Thus, they contended that the percentage of the district's budget given by the state had to remain at the level it was when the Headlee Amendment was enacted.

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[39] School Comm. v. Commissioner of Educ., 492 N.E.2d 736 (Mass. 1986).

[40] Durant v. State Bd. of Educ., 381 N.W.2d 662 (Mich. 1985).

[41] Mich. Const. art. 9 §§ 29-32.

[42] Mich. Const. art. 9 § 29.

[43] Mich. Const. art. 9 § 31.

The court reconciled these two provisions of the Headlee Amendment by deciding that it did not apply to the constitutional provision for free education. It held that the term used in section 29 was "state law" and that this did not include service required under constitutional provisions such as the one for public education. Therefore, the reduction in the state funding level was upheld.

The Supreme Court of Idaho was faced with a petition for writ of mandamus or prohibition brought by the State Treasurer against the State Board of Land Commissioners challenging a statute[44] which provided that revenues obtained from grazing and recreational leases and timber sales on state lands could be used for expenses incurred in administering those lands.[45] The State Treasurer asserted that under the Idaho Constitution school lands and proceeds of the school lands could only be used for the maintenance of the state's schools. The court, however, found that the leases and proceeds from timber sales were not proceeds of the school lands and thus could be diverted to other purposes. The court turned to a provision in the Idaho Admission Bill which allowed for oil and gas leases on state lands "under such regulations as the legislature shall prescribe." The court thus interpreted the term proceeds in the constitution to constitute only proceeds from the sale of the lands, not income generated from leases of the land. Applying basic trust law principles, the court found that the use of the proceeds from the leases for the maintenance, management, and protection of the lands was in accord with the general rule that a trustee may deduct expenses from the res of the trust in order to preserve and protect the trust property.

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[44] Idaho Code § 58-140.

[45] Moon v. State Bd. of Land Comm'rs, 724 P.2d 125 (Idaho 1986).

Funds for Special Education

Cases reviewed in this section deal only with the fiscal or revenue aspects of funding for special education. Issues which involve the substantive portions of a child's program are dealt with in the chapter entitled "Handicapped." Cases in this section dealt with reviews of audits of private schools, a state agency's rule limiting reimbursement for out-of-state placements, the right of local agencies to carry over funds not expended, and the proper uses of state discretionary funds.

In a Pennsylvania case, the plaintiff, a private school providing special education services, appealed the decision of an audit conducted by the Department of Education which made adjustments to the payments made to the school.[46] Ashbourne challenged the decision alleging it was not made timely, enforced retroactive regulations, was inaccurate regarding the computation of school days, and included certain disallowances that were improper. The court first noted the limited scope of judicial review was whether the "decision was in accordance with law, the findings of fact were supported by substantial evidence, or constitutional rights were violated."[47] The adjustments to payments to be received in the 1981-82 fiscal year were made when it was determined through the audit that Ashbourne had been overpaid in the 1980-81 fiscal year. The court determined that the adjustment was timely since the audit of the 1980-81 fiscal year was completed in 1982 and the adjustment was made in 1982. The controlling regulations required that "any adjustments in payment required as a result of the audit will be made in the final payment to that school in that fiscal year."[48] The court upheld the department's construction of that regulation as being the fiscal year in which the audit was completed; to require otherwise would necessitate audits to be done in the years in which the expenses were incurred. That requirement would be impossible. Secondly, Ashbourne contended that the department erred by applying audit regulations which became effective on August 30, 1980 to expenses incurred in a fiscal year which began on July 1, 1980. The court found that even if expenses were incurred before the change in regulations became applicable, it was not improper. Agencies may adopt and enforce retroactive regulations as long as their application does not interfere with vested rights to compensation. Since the compensation here was not vested until reviewed, Ashbourne was not harmed. Third, the court found no evidence to support the plaintiff's contention that the number of days had either been miscalculated or that permission had been given to operate on a short school calendar. Finally, the court upheld the department's disallowance of certain specific expenses because they were not sufficiently documented; and upheld the expense of yearbook printing as unreasonable under a Pennsylvania statute which requires private schools to charge students for personal items. Clearly the court gave the department's determinations of fact and constructions of law great deference in dismissing the plaintiff's charges.

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[46] Ashbourne Educational Servs., Inc. v. Commonwealth of Pa. Dep't of Educ., 499 A.2d 698 (Pa. Commw. Ct. 1985).

[47] *Id.* at 700.

[48] 22 Pa. Code 171.19 (e)(1).

A court reached similar conclusions in New York.[49] Ferncliff was a private residential school for mentally retarded children operating in New York. In 1981, the New York State Education Department audited its financial records for 1978-79. The audit determined that the school's actual costs for 1978-79 exceeded those projected and that for 1979-80 its costs were less than projected. As a result, the department recommended to the Commissioner of Education that the reimbursement rate be adjusted for those two years, the net effect would be an overpayment to Ferncliff in the amount of $41,914, offsetting one year against the other. The Commissioner, however, chose not to offset and approved only the reduction in payment for the 1979-80 school year in the amount of $140,628. The court summarily found that the Commissioner was not required by the state to offset one year against the other and that failing to do so was not an abuse of discretion.

In 1984, the New Hampshire State Board of Education adopted a rule which set a limit on the state reimbursement rate for placement costs at out-of-state facilities. The practice was challenged as a violation of section 504 of the Rehabilitation Act of 1973.[50] The Office of Civil Rights conducted an investigation and in its opinion found no violation of section 504 or the implementing regulations.[51] It found that local education agencies (LEA) made placements based on students' individual educational needs. The state education agency's (SEA) rule only limited the amount of reimbursement local agencies would receive from the state; it did not limit the amount they could spend. The New Hampshire Department of Education's reimbursement for services to handicapped students never was 100%, the state legislation required only 80% reimbursement of cost to the district. This policy did not limit the LEA's expenses for an out-of-state placement, or even what it could claim for reimbursements, the policy only set limits on the level of state reimbursement.

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[49] Ferncliff Manor for the Retarded, Inc. v. Ambach, 497 N.Y.S.2d 512 (App. Div. 1986).

[50] 20 U.S.C. § 794.

[51] New Hampshire Dep't of Educ. Complaint No. 01-86-1012, 258 E.H.L.R. 197 (O.C.R. 1986).

In response to a question concerning a state education agency requiring a remission of funds to the state, rather than allowing the local agency to carry funds over from one year to the next, the Office of Special Education found that the Education of the Handicapped Act (EHA)[52] provides only limited circumstances under which an SEA may recover funds from an LEA.[53] The dispute arose when an LEA in New Hampshire terminated the contract of a psychometrist in mid-contract. The local agency attempted to hire a replacement, but there were no applicants. Part of the work was contracted on a piecemeal basis to independently employed psychometrists. Some funds for the position remained unspent in the 1985 fiscal year. The LEA, however, anticipated spending that amount in fiscal year 1986 to complete the testing that remained uncompleted in the previous year by piecemeal contracts. The state special education director denied the request and demanded remission of the funds to the state special education discretionary fund. The Office of Special Education responded by the Tydings Amendment, which states:

> Any funds from appropriations to carry out any programs to which [GEPA] is applicable during any fiscal year which are not obligated and expanded by educational agencies or institutions prior to the beginning of the fiscal year succeeding the fiscal year for which such funds were appropriated shall remain available for obligation and expenditure by such agencies and institutions during such succeeding fiscal year.[54]

The response concluded that this provision permits agencies to hold funds from a particular fiscal year during a "carryover period" of one additional fiscal year.

Additional advice in terms of explaining when a state agency could seek remission of local funds and for what purposes was given. When an SEA does recover funds from an LEA they must be allocated to other LEAs or used by the SEA in providing special education and related services to handicapped children within that LEA. Section 624(d) of the EHA allows a state agency to take funds from a local agency and provide special education and related services directly to handicapped children residing in the area served by the local agency when the LEA: (1) is unable or unwilling to establish and maintain programs which meet the EHA requirements, (2) is unable or unwilling to be consolidated with other locals to establish and maintain such programs, or (3) has one or more handicapped children who can best be served by a regional or

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52. 20 U.S.C. § 1401 et seq.
53. Holt, 211 E.H.L.R. 390 (E.H.A. 1986).
54. *Id.* at 391.

state center. Demanding remission for any other reason or use would be in contravention of section 611(d) of the EHA which requires state agencies to allocate funds to local agencies based on the number of handicapped children in that local agency receiving special education and related services.

The Office of Special Education answered another inquiry regarding the SGA's proper use of federal funds.[55] Section 611(2) of the EHA allows a state agency to use 5% of the federal funds received for administrative costs, the remainder to be used for direct and support services to handicapped children under the EHA. Part of the defined support services includes a "Comprehensive System of Personnel Development" which may include a variety of training activities. The question arose whether the salaries for the staff of these training projects should be allocated under support services or must be taken out of the 5% allowed for administrative costs. The Office of Special Education's response indicated that it is appropriate to allocate staff salaries, in whole or in part, to support services rather than to administration.

A second inquiry dealing with special education funding was whether an SEA may pay reasonable and necessary expenses of its State Advisory Panel. The Office of Special Education responded by indicating that under 34 CFR 300.653(f) it is appropriate for a state agency to reimburse members of the state panel, but only with that 5% of its EHA federal funds available for administrative costs, not with that portion of the funds designated for direct and support services.

Federal Funds for Education

In *Bell v. New Jersey and Pennsylvania*,[56] the United States Supreme Court held that the federal government may recover misused funds from the states. In the wake of that opinion, there have been a number of cases involving the Secretary of Education's decisions seeking repayment (e.g., *Bennett v. Kentucky Department of Education*,[57] *Bennett v. New Jersey*[58]). Three such cases appeared again this year. In addition, a court reviewed the United States Department of Education's construction of the impact aid statute, and federal funds were mandated by a court to fund one of Chicago's desegregation programs.

The Fourth Circuit Court of Appeals reviewed the Secretary of Education's order for the refund of funds allegedly misspent under title I

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[55] McNulty, 211 E.H.L.R. 394 (E.H.A. 1986).

[56] 102 S. Ct. 2187 (1983); *see* The Yearbook of School Law 1984 at 225.

[57] 105 S. Ct. 1544 (1985); *see* The Yearbook of School Law 1986 at 211.

[58] 105 S. Ct. 1555 (1985); *see* The Yearbook of School Law 1986 at 211.

(chapter 1) during 1977-79 totalling $317,435.[59] The amount included funds spent on a secondary summer school program, a Saturday program, and funds for a Home School Worker. The Secretary concluded that the programs funded constituted general aid to the schools because they were not targeted to the special educational needs of title I eligible students and therefore were not appropriate expenditures under title I. The Home School Program was designed to reduce absenteeism in the schools which contained title I children. The employee, after receiving the absentee list for the day, would contact the title I families on the list, by phone or a visit, inquiring about the absence, after which the same procedure was followed for the non-title I children. It was found that equivalent services were provided to both groups of children. The summer school program was for the provision of remedial reading, math, and basic skills instruction to title I children. However, it included summer theater and music programs which were open to all students. It was found that the primary purpose of this was not to provide remedial instruction to title I students, but to provide continuing music education in the summer. Finally, the Saturday program was not limited to title I children and offered extracurricular activities such as photography, drill team, needlepoint, reading for pleasure, and other leisure classes. The school's attempt at defending this program under the auspices of confidence and self-esteem building and developing a rapport with students was not adopted by the Secretary, and it was determined that these were beyond the scope of the stated title I purposes. The court implemented the limited level of review set in *Bennett v. Kentucky Department of Education* (i.e., whether the findings are supported by substantial evidence).[60] The court found substantial evidence to support the Secretary's findings that the expenditures were a misuse of funds as constituting general aid to the school rather than aid aimed specifically at the identified needs of the target children.

The Eleventh Circuit Court of Appeals upheld the Secretary of Education's determination that it must refund $483,517.01 for misuse of title I funds.[61] The United States Department of Education had determined that the state had not provided "comparable" services to nontitle I schools. This requirement was intended to insure that federal funds were used to provide compensatory programs over and above those normally provided in the schools. The state conceded that the comparability requirement had not been met, but that its slight variance from the requirement (the statute allows for a 5% variance in spending) should not necessitate a full refund of the federal funds for all of the schools involved. The Secretary of Education disagreed with the school and the court upheld that decision, reasoning that it was beyond the scope of review for the court to substitute its view of a more equitable remedy for the decision of the Secretary.

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[59] Virginia Dep't of Educ. v. Secretary of Educ., 806 F.2d 78 (4th Cir. 1986).

[60] *Id.* at 79.

[61] Florida Dep't of Educ. v. Bennett, 769 F.2d 1501 (11th Cir. 1985).

The Ninth Circuit Court of Appeals held in a similar manner and required the state of Hawaii to refund $2,109,618.[62] In addition to the comparability of services question raised in the Eleventh Circuit case, the state attacked the statute's no-supplant requirement as unreasonable.[63] The court again deferred to the Secretary of Education's interpretation of the statutory requirements and upheld its decision.

In a federal district court case the court reviewed a finding made by the United States Department of Education and its construction of a statute.[64] This case involved the Bayonne School Board's application for impact aid under the Impact Aid statute. That statute provides that a local district can receive impact aid if the United States owns 10% or more (assessed value) of the real property in a school district.[65]

The Secretary of Education denied the district's request for impact aid. The school district appealed the decision arguing that it misconstrued the statute by dividing the assessed value of federal property by the assessed value of all property in the district, including the federal property, to determine if the district met the 10% criterion. The court approached the issue as one of statutory construction. Thus, if the statute is ambiguous the only issue for the court is whether the agency's construction of the statute is reasonable. The court found ambiguity in the statute since the "statute is silent as to whether the agency should or should not include the value of federal property in the value of all property in the district."[66] Even though the legislative history was found to contain passages supporting both interpretations, the court found the Secretary's interpretation of the statute reasonable since, according to general rules for reviewing an agency's construction of a statute, the court will uphold an agency's interpretation if it finds it possible within the intent of the statute even if the court would have reached a different decision in a de novo review.[67]

A federal district court in Illinois was much more willing to review

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62. Department of Educ., State of Hawaii v. Bell, 770 F.2d 1409 (9th Cir. 1985).

63. 20 U.S.C. § 241 e (a)(3)(B).

64. Bayonne School Bd. v. United States Dep't of Educ., 640 F. Supp. 470 (D.D.C. 1986).

65. 20 U.S.C. § 237(a)(1)(C).

66. Bayonne School Bd. v. United States Dep't of Educ., 640 F. Supp. at 472.

67. *See* Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S 837 (1984).

the administrative decision made by the United States Department of Education.[68] There the Board of Education of Chicago sought an order compelling the Department of Education to provide interim funding for three programs under its desegregation plan. The Secretary had denied funding from discretionary fund money to support the Chicago Effective Schools Project (CESP). The statutory and regulatory authorization for the funds requires that the money be spent on a model program of national significance that materially furthers the overall success of the desegregation plan, is reasonable in costs, and is consistent with the statutory criteria. The statute authorizes the Secretary to fund a local educational agency to carry out programs and projects which, among other things, carry out research and demonstrations related to the purposes of the law, are designed to improve the training of teachers needed to carry out the purposes, and are designed to assist in the implementation of desegregation programs.[69] Under the CESP the money was to be used to pay salaries of assistant principals, which would free up principals' schedules so they could devote their time to the CESP, and to pay for field trips which were to serve as cultural enrichment. The court held that the board was entitled to the release of the discretionary fund monies because it was not contrary to the statute to grant the authorization of funds, and because the project appeared consistent with the express statutory criteria to support the desegregation plan. The court agreed with the denial of funds for a language instruction program which would have provided student tutors for students with low incidence native languages as prohibited by the statute which requires the use of the "most qualified available personnel."[70] Finally, the court ordered the release of funds for a different bilingual program in which the court disagreed with the interpretation the United States had placed on another portion of that statute related to teaching Spanish literacy and heritage to English speaking students. The court found that this was not the primary purpose of the program, but did to a limited extent have that effect because the program included an attempt at maintaining the integrity of the classroom; thus some English speaking students were present during the instruction in question. The court found this was not contrary to the statute,[71] as long as the English speaking children did not exceed 40% of the group.

The interesting part of this case is not so much the actual substance of the ruling, because one must assume that the case is specific to the facts of the Chicago programs and desegregation plan, but the level of review apparently implemented by the court. In the previous cases, the courts were quite specific in terms of the deference that should be given to the administrative agency in interpreting statutes and implementing regulations. Here, however, the court did not discuss whether the United States' interpretation of the statutes was reasonable and apparently substituted its interpretation and determination of fact for those of the administrative agency.

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[68] United States v. Board of Educ., 642 F. Supp. 206 (N.D. Ill. 1986).

[69] 20 U.S.C. § 3851(a).

[70] 20 U.S.C.A. 3231(3)(c)(i).

[71] 20 U.S.C.A. 3223(a)(4)(B).

School Fees

Cases in this section deal with challenges to a school district's exacting fees. In one case, a federal district court reviewed tuition rates for certain alien students under an equal protection clause challenge. In a case in a bankruptcy court, the court determined that a school district could not withhold a student's transcript for failure to pay tuition. In another case, the validity of allowing a receiving school district to set a tuition rate was questioned.

A federal district court in Georgia reviewed the Atlanta School Board's policy of charging tuition for certain alien students under an equal protection challenge.[72] In 1980, the district adopted a policy charging tuition for holders of certain types of visas (B, F-1, F-2, H, I, J, and L), not charging tuition for others (A and G which both relate to certain international organizations), and ignoring other categories of aliens (C, D, E, K, M, and illegal aliens). The plaintiffs are aliens holding F-1 visas and their minor children holding F-2 visas. The family resided within the Atlanta School System and the children attended Atlanta schools from 1978 to 1982. The court found that the policy violated the equal protection clause. First, it found that under the policy "identically situated persons would be treated differently based on alienage."[73] Specifically the court noted the district admitted that

> a person who came from Birmingham, Alabama, to attend Georgia Tech for four years to earn an advanced degree could demonstrate "residency" within the city and send his children to school tuition-free. Mr. Pena, a Venezuelan citizen, could come to the city to attend Georgia Tech for four years to get an advanced degree, and could not, under any circumstances, demonstrate "residency" within the city so that his children could attend school tuition-free.[74]

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[72] Pena v. Board of Educ., 620 F. Supp. 293 (D. Ga. 1985).

[73] *Id.* at 299.

[74] *Id.* at 299-300.

Distinctions based on alienage trigger strict scrutiny under equal protection analysis. Thus the court next had to determine if the policy could be justified as necessary to a compelling state interest. The district offered several justifications for the policy: to make Atlanta's policy conform to others in the state, to defray added expense involved in educating alien children, and to discourage Iranian students from entering the United States and taking advantage of tuition free high school to learn English before they entered an American university. The court found none of these interests compelling. It, in fact, used the last reason as conclusive evidence of intentional invidious discrimination, and found the second reason invalid after the Supreme Court ruling in *Plyler v. Doe.*[75] In *Plyler*, the court invalidated a Texas law which denied a free education to illegal aliens. In addition, the court found that since these policies did not apply to all nonresidents, or to all types of resident aliens, they were not narrowly tailored to serve the proffered interest. Thus, the court found that the policy was a violation of the plaintiff's equal protection rights. It is interesting to note that the policy was rescinded in 1982 but the school district refused to refund one year's tuition paid by the plaintiff. In the case, the court granted a summary judgment on the issues of liability of the district, the school board, and the individuals on the board for a section 1983 action, and the issue of damages was left for trial.

A bankruptcy case from Ohio[76] involved the issue of a school's withholding a transcript for failure to pay tuition. The Dembeks enrolled their son in Brookside in the Sheffield Public School District for the school years 1983-84, 1984-85. Because they were residents of the Lorrain School District, they were required to pay nonresident tuition expenses to the Sheffield District. They paid the full tuition for the first year, but only a portion of it the second year. The Dembek's moved, and enrolled their son in their resident district, Oberlin, for the 1985-86 school year. At the end of that year, they received a letter from the Oberlin School District informing them that their son had not been promoted to senior status, and that his graduation was in jeopardy because Brookside had refused to release his transcripts until the delinquent tuition fees were paid. Sometime after the Dembek student had been enrolled in Oberlin, his parents filed a petition of bankruptcy and included in their listing of debts the Sheffield tuition. The Dembeks filed a petition for an order compelling the board of education to turn over a copy of the school transcript. The court held that the attempt to collect the debt by withholding the transcript was prohibited by the bankruptcy debtor protection provision of the Bankruptcy Code.[77] In addition, the court held that the school district could not justify withholding the transcript as an attempt to collect a debt owed by the son, since the state statutes clearly indicated that the tuition was the financial obligation of the parents and not the child.[78] Nor could they justify the debt being that of the son by an implied contract with the son, since there was no mutuality of assent necessary for a valid contract. The issue of the substantive due process guarantees that would prohibit a penalty for actions of another was not addressed by the court.

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[75] 457 U.S. 202 (1982).

[76] Dembek, 64 B.R. 745 (Bankr. N.D. Ohio 1986).

In a Nebraska Supreme Court case,[79] a taxpayer sought an injunction against a statute involving the determination of the rate for nonresident tuition. The taxpayer alleged that the statute was an unconstitutional delegation of authority because the receiving school district was allowed to set the tuition rate. The statute in question had been repealed and replaced by a system under which the State Department of Education determined the nonresident high school tuition rate.[80] Thus, there was no longer any argument on which to base the injunction. However, the court remanded the case for a determination of the constitutionality of the prior statute on the setting of nonresident tuition. Even though the statute had been repealed, the Nebraska Supreme Court found that this did not render the action moot because, if the statute were found unconstitutional, it would entitle individual taxpayers to refunds of taxes paid.

SCHOOL TAX ISSUES

Power to Tax

These cases all essentially deal with a school district's authority to raise funds. In one case, taxpayers challenged a school district's authority to impose two different tax rates within one recently merged school district. Another case dealt with taxpayers' allegations that the school district did not have the authority to impose additional taxes because it had a surplus of funds. One case principally involved the method taxpayers must use to obtain a refund after they had successfully challenged the constitutionality of the tax. The next case involved a court's review of the determination of tax liability on a developer. The final case in this section dealt with the enforcement of an agreement between a school district and a real estate developer whereby the developer was to pay school impact fees.

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[77] § 362(a)(6).
[78] Ohio Rev. Code Ann. § 3327.06.
[79] Mullendore v. School Dist. No. 1, 388 N.W.2d 93 (Neb. 1986).
[80] Neb. Rev. Stat. § 79-494.

In 1971, the Swarthmore-Rutledge Union School District and the Wallingford School District merged. Before the merger, Swarthmore was a sponsor of the local community college and was liable for a proportionate share of its capital and operating expenses. Beginning with the first budget of the new merged district, and every budget thereafter, the merged district levied and collected a property tax on all real estate solely in the Swarthmore area to support the community college. Taxpayers complained that the merged school district had no authority to impose the separate property tax. The taxpayers sought an injunction from the district's levying and collecting such taxes. The court summarily held that the district had the statutory authority to impose the additional tax in only a portion of the new district.[81]

In a Pennsylvania case, the school district filed an action against delinquent taxpayers to collect past taxes.[82] The taxpayers defended alleging that the school district did not have the authority to levy taxes because it had a surplus of funds. In Pennsylvania, a school district is authorized to levy, assess, and collect taxes for general revenue purposes. The court found that the only limits on that power were those related to rates and to the maximum aggregate amount to be levied. The court held that these limitations provided the exclusive method of determining whether a tax was "excessive or unreasonable." The mere existence of surplus funds did not support the claim that the assessed taxes were excessive or unreasonable. Thus, the school district's authority was upheld.

In a case from Kentucky, taxpayers who had successfully challenged the constitutionality of school tax assessments on agricultural land were seeking a refund of taxes paid under the statute from the school district.[83] The school was seeking an injunction to restrain the sheriff from granting the refund. The issue principally involved the method successful taxpayers must use to obtain a refund. The Kentucky Supreme Court held that the taxpayers who had been successful in their original statutory challenge were not automatically entitled to a refund.[84] It found that where a statute provides for a procedure to seek refunds, a refund can only be given pursuant to that procedure.[85] Kentucky has a statute which sets forth procedures for tax refunds.[86] Thus, the taxpayers had to institute a supplemental action pursuant to the statutory procedure to obtain a refund of taxes which they paid, but which were later found to be unconstitutional.

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[81] Hummer v. Board of School Directors, 515 A.2d 359 (Pa. Commw. Ct. 1986).

[82] Thompson v. West Branch Area School Dist., 505 A.2d 386 (Pa. Commw. Ct. 1986).

[83] Board of Educ. v. Taulbee, 706 S.W.2d 827 (Ky. 1986).

[84] Dolan v. Land, 667 S.W.2d 684 (Ky. 1984).

[85] Board of Educ. v. Taulbee, 706 S.W.2d at 828.

[86] Ky. Rev. Stat. § 134.590(6).

In a Mississippi case, De Soto county brought an action against W.H. Hopper, a real estate development corporation, to compel it to pay school building taxes.[87] The corporation had originally posted bond for the amount of the tax in 1974. After this, it filed suit challenging the constitutionality of the enforcement of the tax against it. Hopper lost that action and the appeal in 1980. In 1981, Hopper then filed this action alleging that it did not owe the tax. The Supreme Court of Mississippi held that Hopper should be estopped from challenging the tax liability since it would not have had standing to pursue the previous action had it not been subject to the tax under the statute. In addition, the court found that the taxing authority has the burden of proof. The county, nonetheless, in this action sustained that burden through documents and corroborating testimony.

In California, after the adoption of Proposition 13, ad valorem property taxes in excess of 1% were prohibited. Since most localities had already reached that limit at the time of passage, school districts in essence were prohibited from increasing property taxes. In response to this constraint and the need to meet the growing demands of increasing school enrollments, local school districts began imposing school impact fees. These are generally fees imposed on real estate developers to cover the costs of constructing and maintaining school facilities attributable to their developments. In 1977, Candid Enterprises entered into an agreement with the Grossmount Union High School District to pay fees. In 1978, the School Facilities Act[88] went into effect which authorized cities and counties to require developers to pay fees for temporary school facilities. In 1980, the school district discontinued the practice of entering into agreements for school impact fees with developers, because it determined that sufficient funds had been acquired to handle the projected enrollments. The developer sought building permits in 1980 and in 1981 paid under protest the amount of fees specified in the 1978 agreement. The developer sought a refund of those fees under the contention that the School Facilities Act preempts the school district's authority to enter into impact fee agreements. The Supreme Court of California[89] analyzed the issue of preemption of local authority by state action under the following test:

> In determining whether the Legislature has preempted by

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[87] W.H. Hopper and Assocs. Inc. v. De Soto County, 475 So. 2d 1149 (Miss. 1985).

[88] Cal. Gov't Code § 65970 *et seq.*

[89] Candid Enters., Inc. v. Grossmont Union High School Dist., 705 P.2d 876 (Cal. Ct. App. 1985).

> implication to the exclusion of local regulation we must look to the whole purpose and scope of the legislative scheme. There are three tests: (1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the municipality.[90]

The court, in conclusion, disagreed with an attorney general's opinion on the issue and found that the state had not preempted local authority. The statute by its terms allowed for alternative school facilities financing arrangements with builders of residential developments. Thus, the court enforced the 1978 agreement for payment of school impact fees entered into by the district and the developer.

Bond Issuance

Cases in this section deal with the process of raising revenues through bonds. The first two cases reported dealt with the standard of review the court has over a school board's adoption of a bond issue.

Voters filed a suit to contest a bond election alleging that the ballots used in the election failed to conform to statutory requirements.[91] First, it was claimed that the back of the ballots did not adequately state the name of the public measures to be voted on, since the propositions merely set forth the measures by number instead of name which was contrary to statute.[92] The substance of the measures were, however, contained on the front of the ballots. The court found that no harm had been done, and thus there had been substantial compliance with the statute. Second, the election was challenged because the texture of the paper ballots was such that one could see how a person voted through the paper, which was contrary to statute.[93] The court found that no voters had been disenfranchised because of the defect, nor had it affected any voter's decision or the results of the election. In sum, the court found that the ballots substantially complied with the statute governing submission of a public question to the electorate. Therefore, the election results were upheld.

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[90] *Id.* at 882.

[91] Behrman v. Whiteside School Dist. No. 115, 492 N.E.2d 1021 (Ill. App. Ct. 1986)

[92] Ill. Rev. Stat. 1985 ch. 46, § 16-7.

[93] Ill. Rev. Stat. 1985 ch. 46, § 16-3.

A Texas case presented the issue of another school election appeal.[94] Taxpayers contested a school bond election, and the school district filed a separate law suit seeking a declaratory judgment that the bond proceedings were valid. The two cases were consolidated. The case, however, was dismissed before a trial on the merits because the taxpayers failed to post bond with the court after being ordered to do so. The dismissal was upheld by the appellate court.

In Pennsylvania, the state constitution authorizes the legislature to set debt limits for all units of local government.[95] The state Debt Act sets the debt ceiling and provides for the means for incurring, evidencing, securing, and collecting this debt.[96] In 1982, the Pleasant Valley School District approved a building project for a school within the district. After receiving approval for the project from the State Department of Education in 1984, the board authorized a series of general obligation bonds and filed for approval with the Department of Community Affairs pursuant to the Debt Act. Shortly thereafter, taxpayers filed a complaint with the Department of Community Affairs challenging the proceedings which led to the authorization of the bond issuance. The complaint was dismissed by the Department and the taxpayers appealed to the court.[97] Basically the court dealt with the case by determining the standard of review that the department has over the board's adoption of the bond issuance under the Debt Act. The court found that in review the issues should be "very narrowly prescribed, restricting inquiry into procedural and substantive matters of the local government unit, *taken pursuant to this act*, involving only: (1) the *regularity* of the proceedings, (2) the *validity* of the bonds, and (3) the *legality* of the purpose for which such obligations are to be issued."[98] The court's review of the department's finding were limited "to whether constitutional rights were violated, an error of law was committed, or whether findings of fact were supported by substantial evidence."[99] The court upheld the department's determination that the wisdom of the project was not subject to review as was contended by the taxpayers. The taxpayers did raise procedural issues under the statute which were subject to proper review by the department—those which involved the proper advertisement of the proposed resolution. However, the court found that there was evidence to support the department's findings that the issues were without merit. Therefore, the department's findings were upheld.

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[94] Burns v. Delmar-West Lamar Consol. School Dist., 720 S.W.2d 836 (Tex. Civ. App. 1986).

[95] Pa. Const. art 9 § 10.

[96] 53 Pa. Const. Stat. § 6780-1 *et seq.*

[97] Property Owners v. Pleasant Valley School Dist., 515 A.2d 85, 99 (Pa. Commw. Ct. 1986).

[98] *Id.* at 88.

[99] *Id.*

Relationship of School District to Other Government Units

Cases reported in this section involve disputes between a school district and another governmental entity; the issues presented are varied. In the first case reported, the city and the city school district brought an action to compel the county to pay them a proportional share of the proceeds of school improvement bonds issued by the county. The issue presented in the next case was whether a municipality was obligated to indemnify a school district for a loss in school tax revenues resulting from the town's adoption of a tax found to be unconstitutional. In the next case, the school district brought action against the county clerk, county board, and surety on county clerk's penal bond for damages caused by the clerk's failure to extend the correct tax rate in tax bills sent to taxpayers. At issue in another case was whether the school district had the authority to collect summer taxes or whether that was the exclusive authority of the township. Another case involves a school district changing the duties of the tax collector after it adopted a lockbox tax collection system, and the final case deals with the school district's liability for impact fees to an environmental control district.

In a case from Tennessee, the city of Newport and the city school district brought an action to compel Cocke county to pay them a proportional share of the proceeds of school improvement bonds issued by the county.[100] The basis of the claim was a state statute which provided that counties in which cities operate an independent school district must pay those cities a share of the sale of bonds for schools, based on the proportion of average daily attendance.[101] However, "a city . . . which operates no high schools is not entitled to the pro rata distribution of the proceeds of bonds issued by a county for high school purposes."[102] In this case, the city of Newport operated an elementary district, kindergarten through twelfth grade system, considering seventh through twelfth grade to be high school. The county issued bonds to add classrooms and improve the gymnasium at Cosby School, a school containing grades kindergarten through twelve. The gymnasium was used on occasion by the elementary grades for recess during inclement weather. The seventh and eighth grade pupils attended regularly scheduled physical education classes in the gymnasium. The classroom space was used exclusively by grades nine through twelve. The city contended that since there was incidental use of these facilities by the elementary grades, the bonds were issued for overall school purposes, and thus they should be entitled to their pro rata share. The court deferred to the county's stated purpose in the issuance of the bonds as "high school bonds" and found that the limited use of the facility by other students did not change the essential character of the facility as a high school gymnasium.

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[100] City of Newport v. Cocke County, 703 S.W.2d 626 (Tenn. Ct. App. 1985).

[101] Tex. Code Ann. § 49-3-1003(b)(i).

[102] City of Newport v. Cocke County, 703 S.W.2d at 627.

The issue presented in a New York case was whether a municipality, the town of Webster, was obligated to indemnify another state entity, Webster Central School District, for a loss in school tax revenues resulting from the town's adoption of a tax found to be unconstitutional.[103] In the original action, a taxpayer had brought suit against the school district and town to enjoin attempts to collect school taxes in excess of the amount that would be payable if the prior uniform rate of taxation were applicable rather than the town's recently adopted homestead dual tax rate system.[104] As a result of the court's ruling in the taxpayer's favor, the school district was required to reduce the 1985-86 tax levy imposed on Xerox by approximately $892,000. Following judgment in favor of the taxpayer, the school district sought indemnification against the town to recover for lost revenues. The court found that "the enactment of legislation cannot serve as a basis for imposing civil liability, even where such legislation is subsequently held to be unconstitutional."[105] In addition, the town was acting on the basis of a state statute which is presumptively valid. Thus, the New York Supreme Court, Monroe County held that the school district was not entitled to indemnification against the town even though the town's imposition of dual tax rates was found to be unconstitutional.

In 1983, the voters in the Beach Park Community Consolidated School District passed a referendum to increase the maximum tax rate for the educational fund by $.50 per $100 on equalized assessed valuation. After this, the school board adopted its budget and filed its levy for 1983 taxes to be collected in 1984 with the county clerk. The county clerk instead of determining the tax due based on the new tax rate, used the old lower tax rate. Despite the school district's informing the county clerk of the error, the tax bills went to the collector and then to the taxpayers based on the incorrect tax rate. The board of education brought suit against the county clerk, county board, and surety on the county clerk's penal bond for failing to extend the correct tax rate. There was in effect an Illinois statute which allowed additional tax to be included on the tax bill for the next year if a tax was prevented from being collected by reason of error.[106] The court found this statute to be the exclusive remedy the school had to pursue, thus it could not recover on the county clerk's penal bond.[107]

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[103] Xerox Corp. v. Town of Webster, 502 N.Y.S.2d 379 (App. Div. 1986).

[104] Foss v. City of Rochester, 480 N.E.2d 717 (N.Y. 1985); Foss v. City of Rochester, 489 N.E.2d 727 (N.Y. 1985).

[105] Xerox Corp. v. Town of Webster, 502 N.Y.S.2d at 381.

A school district brought an action against a township supervisor and a township trustee seeking mandamus to compel the township supervisor to deliver a certified copy of the assessment rule. What really was at issue was whether the township was the exclusive entity to collect summer property taxes. The court held that it was not, but that the school district also had that authority.[108]

In 1977, Penn-Delco School District adopted a new system of tax collection which involved the use of lockboxes. Recognizing the cost savings and reduced work load realized by the system, the school board adopted a resolution in 1981 which transferred most of the tax collectors' duties to district employees and reduced the tax collectors' salary to $1. The tax collectors sought an injunction against the use of the system and the restoration of their jobs. The court held that since the duties were statutorily prescribed the school district lacked authority to transfer those duties to others. Thus, the court enjoined the use of the lockbox tax collection system and reinstated the previous salary.[109]

A Florida case involved the Palm Beach County School Board's action for declaratory judgment and injunctive relief against an environmental control district.[110] The school board was claiming that the school was exempt from certain fees the environmental district was attempting to assess. In 1981, the school district was in the process of building a middle school. The sewer system, under the control of the environmental control district, did not yet reach this property, but the school district wanted to be included in the service at such time as the sewer system was constructed. In negotiating this, the environmental district assessed the school district for service availability standby charges and line charges, which would basically buy the right to make actual physical connection to the sewer system when the system reached the middle school property. The school district refused to pay the sum claiming it was exempt from impact and service availability fees under Florida statutes.[111] The court found that under the definition given, the fees were impact fees from which the district should be exempted. In addition, the environmental district claimed the exemption statute was unconstitutional on several grounds, the most notable being an alleged violation of equal protection. To this allegation the court found no violation. The state legislation did have a rational basis; the classification system used bore some rational relationship to a legitimate state purpose. The court found that it was within the legislature's authority to attempt to limit the costs of school construction by exempting these facilities from impact fees imposed by other public agencies.

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[106] Ill. Rev. Stat. ch. 120, par. 703 (1983).

[107] Board of Educ. v. Hess, 488 N.W.2d 1358 (Ill. App. Ct. 1986).

[108] Lenawee Intermediate School Dist. v. Raisin Township Supervisor, 388 N.W.2d 306 (Mich. Ct. App. 1986).

[109] Penn-Delco School Dist. v. Schukraft, 506 A.2d 956 (Pa. Commw. Ct. 1986).

[110] Loxahatchee River Environmental Control Dist. v. School Bd., 496 So. 2d 930 (Fla. Dist. Ct. App. 1986).

Use of Revenue

These cases deal with limits on school districts' substantive spending power. The first case involved the question of properly spending funds in a proposed budget election. The other case reported dealt with a school ditrict's authority to maintain a budgeted line item reserve fund for unexpected contingencies in addition to a statutorily authorized reserve fund.

The Court of Appeals of New York reversed a state court ruling on the issue of expenditures for voter election information.[112] The court found that the board of education was authorized to present a proposed budget to the voters accompanied by educational and informational material. However, in this instance the information contained subjective comments urging the voters to support the board's position in the election. This exceeded the authority granted to them in the statute.[113]

The Utah Supreme Court reviewed the Salt Lake City School District's authority to maintain a budgeted line item reserve fund for unexpected contingencies in addition to a statutorily authorized reserve fund for unexpected contingencies.[114] The Utah Legislature in 1971 authorized districts to allocate up to 5% of their maintenance and operating budgets to an undistributed reserve.[115] The Salt Lake City School District created an additional line item reserve to be used to cover increased electricity and fuel costs, school outings, student body activities, school supplies, retirement, insurance, garbage collection, professional meetings, grounds maintenance, and legal services. The Supreme Court of

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[111] Fla. Stat. Ann. 235.26(1) (1981).

[112] Phillips v. Maurer, 490 N.E.2d 543 (N.Y. 1986); *see* The Yearbook of School Law 1986 at 225.

[113] N.Y. Educ. Law §§ 1716, 1709 (33).

[114] Olson v. Salt Lake City School Dist., 724 P.2d 960 (Utah 1986).

[115] Utah Code Ann. § 53-20-2 (1953) (Repealed 1981).

Utah found that the legislative intent of the statute was to restore sound practices to school district budgeting by requiring districts to carefully estimate their needs and ensure that the budget is an accurate reflection of expenses. It found that since an upper limit had been set by the legislature, it intended the statutorily prescribed reserve fund to be exclusive. Therefore, it held that the school district had exceeded its statutory authority with the practice.

Tax Exemptions

These cases deal with taxpayer efforts to draw themselves under the provisions of statutorily prescribed tax exemptions. One case dealt with a religious use exemption; one dealt with a public charity exemption; and one involved a school district that attempted to qualify for an exemption.

A religious organization brought an action against the school district claiming that a tract of land it held was exempt from taxation under a religious use provision.[116] The exemption, in pertinent part, reads: "the Legislature may . . . exempt from taxation . . . actual places of religious worship."[117] The organization's religious beliefs were patterned after the early Jewish tenants, in which the land was thought to be sacred and used for the purposes of the health and education of the people. They were claiming an exemption for the full seventy-seven and one-half acres which they owned. Members of the organization lived, raised crops, and grazed their animals on the land. Religious worship was held in the individual homes and in a common synogogue building on the property. An exemption was granted for two of the acres. The court of appeals held that the additional property was not exempt from taxation under the religious use provision. The court reasoned that even though the land may be used for religious purposes, it was not used "primarily as a place of regular religious worship" as is required for the exemption.

The issue decided in a Pennsylvania case dealt with a public charity exemption.[118] There the taxpayer was a nonprofit organization which was constructing a housing complex for elderly and handicapped persons. The school district was attempting to collect a residential construction tax on the property. The taxpayer claimed an exemption as a "public charity." The court found that the taxpayer was not a "purely public charity" entitled to an exemption. In order to qualify as a public charity the organization must: (1) advance a charitable purpose; (2) donate or render gratuitously a substantial portion of its services; (3) benefit a substantial and indefinite class of persons who are legitimate subjects of charity; (4) operate entirely free from private profit motive; and (5) relieve the government of some of its burden.[119] *a* The court found that the taxpayer was not entitled to the exemption. Even though the housing project for elderly and handicapped residents possessed some charitable characteristics it did not possess them all. The court found that this housing project did not relieve the government of some of its burden, since essential services were not provided to the residents of the housing project.

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[116] General Ass'n Branch Davidson Seventh Day Adventists v. McLennan, 715 S.W.2d 391 (Tex. Civ. App. 1986).

[117] Tex. Const. VIII, section 2.

[118] Council Rock School Dist. v. G.D.L. Plaza Corp., 496 A.2d 1298 (Pa. Commw. Ct. 1985).

A school district itself was seeking a tax exemption in the final case. The Court of Appeals of New York held that school districts which independently determined their budgets and the sums to be raised by taxes and submitted those amounts to county officials who then levied the taxes, did not themselves levy the taxes and thus could not opt out of the exemption for 50% of the increase in assessed value due to commercial, business, or industrial construction.[120]

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[119] *Id.* at 1301.

[120] Walker v. Board of Assessors, 487 N.E.2d 276 (N.Y. 1985).

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HIGHER EDUCATION

Robert M. Hendrickson*

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*Morgan M. Laury, doctoral student and graduate assistant in the Higher Education Program, assisted in the preparation of this chapter.

INTRODUCTION

This year's litigation is again voluminous, but the number of cases is down slightly from last year. The Supreme Court ruled on two state discrimination cases, finding that racial discrimination still existed in the way the state higher education systems were structured. In addition, the Court ruled that discrimination prior to the passage of title VII could be considered as a factor in a salary disparity case. The Court also granted *certiorari* on the question of whether an Arab-American was a racial group under title VII. Finally, the Court ruled on financial aid to a blind student attending a private, religiously affiliated college.

Cases involving termination of tenured faculty for cause increased this year, as did financial exigency cases, and questions of nonrenewal or denial of tenure continued to receive attention. A number of institutions litigated whether certain fringe benefits would be considered wages subject to income tax.

Student litigation this year focused again on first amendment issues. Cases involving loan default continued to be heavy. Academic dismissal litigation showed a substantial increase this year, and focused on graduate and professional students.

Liability issues continued to receive attention in the courts. Several deceptive practice cases, involving both foreign and local institutions, were litigated in 1986.

INTERGOVERNMENTAL RELATIONS

This section deals with the relationship between postsecondary institutions and various governmental agencies. Litigation ranges from questions on the authority of boards, access to information through sunshine laws, questions of tax exempt status, and issues of accreditation.

Several cases challenge the authority of boards in decision making. The lead case involves the issue of divestment. Students sought to enforce the State Board of Higher Education's resolution instructing the Oregon Investment Council (OIC) to cease purchasing common stock in corporations doing business in South Africa.[1] The court noted that OIC was not controlled by the State Board of Higher Education, and OIC was correct in assuming that the resolution violated the state's "prudent investment rule." The court found that the students' alleged damage, the commission of a social and moral wrong, was not a legally recognized injury. Therefore, the students lacked standing.

One case challenged the board's authority to use the interest earned on collected fees.[2] The court ruled that interest income can only be used for the sole purpose of the collected fees from which it was derived. Another case challenged a legislative moratorium on the formation of new community colleges within the state.[3] The election held prior to the passage of the moratorium, but not canvassed until after the passage date, came under the provisions of the moratorium because the election was not official until the date of canvassing.

In a controversy over the appointment of trustees, a taxpayer was successful in challenging the procedures on two grounds.[4] First, the board failed to comply with the search committee provisions of the statute and, second, an employee of the college could not participate in the decision because of a conflict of interest.

A Louisiana case challenging the Board of Trustees' authority to change the name of its institution was again before the court.[5] The court, on remand, upheld the lower court ruling that the legislature, not the Board of Trustees, was empowered to change the name of state institutions in Louisiana under the provisions of the state constitution.

State ethics code violations by a member of the Board of Supervisors of an institution was before the court because his company had several contracts with the institution.[6] The court of appeals found that a contract with the athletic department to place advertisements on the scoreboards of the stadium violated the code of ethics statutes forbidding such financial arrangements between board members and the institution. However, a contract awarded to the lowest bidder on the basis of competitive bids, where the supervisor had no input in any part of the bidding process, was an exception to the code and not a conflict of interest. The state supreme court reversed this opinion and found that all of the contracts violated the ethics code and the ethics code did not violate the board members' rights under the equal protection clause.[7]

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[1] Associated Students of Univ. of Or. v. Oregon Inv. Council, 728 P.2d 30 (Or. Ct. App. 1986).

[2] Queen v. Moore, 340 S.E.2d 838 (W. Va. 1986).

[3] Shepherd v. Brumback, 714 P.2d 450 (Ariz. Ct. App. 1985).

[4] Taylor v. Salem County Bd., 513 A.2d 365 (N.J. Super. Ct. App. Div. 1986).

[5] Board of Regents v. Board of Trustees for State Colleges and Univs., 460 So. 2d 80 (La. Ct. App. 1984)—*see* The Yearbook of School Law 1986 at 228; *transferred* to Supreme Court, 479 So. 2d 931 (La. Ct. App. 1985); *cert. granted and rem'd*, 481 So. 2d 621 (La. 1985); *aff'd*, 491 So. 2d 399 (La. Ct. App. 1986).

[6] *In re* Beychok, 484 So. 2d 912 (La. Ct. App. 1986).

The authority of the board or state government to set budgets and salaries also was litigated this year. A state court refused to grant jurisdiction in a suit where two-year community college faculty challenged the authority of state university trustees to set salaries.[8] The court ruled that the differentiation of salaries across two- and four-year institutions did not exceed the board's constitutional authority or violate plaintiff's constitutional rights. In another salary dispute, the faculty challenged the authority of the Governor to reduce the budgetary appropriation of an institution by 5% under specific circumstances.[9] The state supreme court upheld a lower court ruling that the Governor was not given veto power by these provisions nor legislative powers in violation of the state constitution by the provisions of the budget-reduction statute.

Sunshine laws, their scope and implementation, were again before the court. A newspaper tried to gain access to a task force on academic achievement.[10] After the drug-related death of one of the school's basketball stars, the Chancellor, in consultation with the Board of Regents, established two task forces to investigate the athletic program at the school. The court ruled that, since the task forces were established by the Chancellor and not by board resolution, they did not come under the requirement of the sunshine laws, allowing them to exclude the press from their deliberations. In a case involving the release of documents under the sunshine laws,[11] the Colorado Supreme Court ruled that certain constitutional rights may have been violated when public safety officers retained the faculty member during an incident at a university office.[12]

Tax exempt status was at issue in a case involving property donated to a college.[13] Property used for educational purposes was tax exempt, while a vacant lot which remained unused was subjected to real estate tax. In another case, college-owned property used for recreational purposes was not tax exempt.[14] The Eleventh Circuit Court found that a commercial property owner was successful in enjoining the institution from closing a public city street without using condemnation proceedings.[15] The owner was able to show that the institution's proposed action would devalue his property.

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[7] *In re* Beychok, 495 So. 2d 1278 (La. 1986).

[8] Cavaioli v. Board of Trustees, 498 N.Y.S.2d 7 (App. Div. 1986).

[9] University of Conn. Chapter of AAUP v. Governor, 512 A.2d 152 (Conn. 1986).

[10] A.S. Abell Publishing Co. v. Board of Regents of Univ. of Md., 514 A.2d 25 (Md. Ct. Spec. App. 1986).

[11] *See* The Yearbook of School Law 1985 at 303, Uberoi v. University of Colo., 686 P.2d 785 (Colo. 1985).

[12] Uberoi v. University of Colo., 713 P.2d 894 (Colo. 1986).

In a case involving accreditation, a night law school failed in its attempt to win a modification of the rules for admission to the bar.[16] The court refused to bypass the requirement that those admitted to the bar be graduates of an accredited law school. The American Bar Association and the accrediting agency required a law school to have a minimum of six full-time faculty to gain accreditation. The night school had no full-time faculty and, through litigation, was attempting to bypass the requirement.

State statutes on land acquisition were involved when Hastings College of The Law purchased land, a city block, for needed expansion. Under the Relocation Assistance Act,[17] the college was required to pay relocation costs and provide housing for low-income displaced tenants. Hastings had provided housing for those displaced who were in need of housing. Appealing a lower court ruling requiring the school to provide 375 units of comparable housing (which was more than two times the number of units they had condemned), the college challenged the standing of the plaintiffs.[18] The court found that both the named plaintiffs and the organization dedicated to aiding the displaced had standing. However, under the Act the court found that the named plaintiffs had failed to show a current need for housing. Plaintiffs had the burden of demonstrating noncompliance with the Act and failed in that burden, resulting in a reversal of the judgment.

Jurisdiction was at issue where an Illinois court found that a campus police officer had the authority to arrest a drunk driver on a city street adjacent to, but not part of, the campus.[19] In Connecticut, a state court refused to grant jurisdiction in a suit against an out-of-state corporation.[20]

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[13] District of Columbia v. Trustees of Amherst College, 515 A.2d 1115 (D.C. 1986).

[14] President of Middlebury College v. Town of Hancock, 514 A.2d 1061 (Vt. 1986).

[15] Henley v. Herring, 779 F.2d 1553 (11th Cir. 1986).

[16] *In re* Laclede School of Law, 700 S.W.2d 81 (Mo. 1985).

[17] Cal. Gov't Code § 7264.5 (1969).

[18] McKeon v. Hastings College of The Law, 230 Cal. Rptr. 176 (Cal. Ct. App. 1986).

[19] People v. Doherty, 487 N.E.2d 1227 (Ill. Ct. App. 1986).

[20] Beachboard v. Trustees of Columbia Univ., 502 A.2d 951 (Conn. Ct. App. 1986).

EMPLOYEES

Litigation in this area continued to be heavy. Cases involving discrimination based on race and sex continued to form the bulk of the cases in this section.

Discrimination in Employment

Cases under title VI, title VII, title IX, and age discrimination are reported in this section. The section on discrimination based on disabilities has been moved to chapter one.

Title VI. A group of individuals known as the Knight group filed suit alleging that the state of Alabama continued to foster a dual system of higher education based on race in violation of previous court orders[21] and title VI.[22] In a thorough review of the system of higher education, including enrollment data, the court found that the state continued to maintain a dual system of higher education based on race. The state system was ordered to submit a plan to the court to dismantle this dual system. The Knight group was joined in this action by two predominantly black public state institutions, Alabama A & M and Alabama State University. This action by the two state institutions resulted in a second case.

In this case, the State Board of Education decided not to recertify the teacher education programs at Alabama State University. The Knight group and the institution sued, charging retaliation, and asked for injunctive relief.[23] On appeal, the circuit court found that the public institution lacked standing to sue the state system of higher education. However, the court found the lower court correct in issuing preliminary injunctive relief to the Knight intervenors since they had standing and such relief would prevent irreparable damage from occurring prior to litigation on the merits.

In a similar case in Tennessee, the Sixth Circuit Court affirmed[24] a lower court decision.[25] The court found that the use of "racial quotas" as part of a consent decree[26] did not deprive nonminority applicants of equal protection.

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[21] *See* Lucy v. Adams, 134 F. Supp. 235 (N.D. Ala. 1955), *aff'd*, 228 F.2d 619 (5th Cir. 1955), *cert. denied*, 351 U.S. 931 (1955); Lee v. Macon County Bd. of Educ., 267 F. Supp. 458 (M.D. Ala. 1967).

[22] *See* The Yearbook of School Law 1986 at 192, United States v. Alabama, 628 F. Supp. 1137 (N.D. Ala. 1985).

[23] United States v. Alabama, 791 F.2d 1450 (11th Cir. 1986).

[24] Geier v. Alexander, 801 F.2d 799 (6th Cir. 1986).

[25] Geier v. Alexander, 593 F. Supp. 1263 (M.D. Tenn. 1984).

[26] Geier v. University of Tenn., 597 F.2d 1056 (6th Cir. 1979), *cert. denied*, 444 U.S. 886 (1979).

In a California case, an assistant dean was passed over on four separate occasions for a dean of instruction position within the community college system and alleged discrimination based on race.[27] The circuit court upheld a lower court decision. Using the shifting burden of proof analysis, the circuit court ruled that the institution provided valid business reasons for its decision and the plaintiff was unable to substantive pretext or discriminatory intent under 42 U.S.C. section 1983.

An academically disadvantaged minority student, dismissed from the medical school due to poor academic performance, charged that the school failed to provide adequate remedial programs, a violation of title VI.[28] At trial, the plaintiff based the case on the theory of intentional discrimination, which plaintiff failed to prove, and the plaintiff could not raise a disparate impact theory claim on appeal when it had not been raised at trial.

In another case, a professor sought injunctive relief from an action in state court.[29]The professor alleged that the state suit was brought by the institution in retaliation for his participation in a discrimination suit brought by a graduate student under title VI. The court ruled that federal district courts could not enjoin a state court and relief was denied.

Title VII. This section deals with questions of tolling, disparate impact, disparate treatment, and salary disputes where discrimination is alleged. Questions of discrimination based on religion at a private church-related institution round out the section.

In the lead case, the Supreme Court ruled that Congress did not intend that a state administrative agency review proceeding would have a preclusive effect on a title VII case in federal court.[30] The case involved a black extension agent employed by a Tennessee university who alleged discrimination in the decision to terminate his employment. The circuit court reversed a lower court decision granting summary judgment to the university under the doctrine of res judicata.[31]

Salary disputes under title VII were litigated this year in the Supreme Court. This Supreme Court case involved the elimination of salary disparity between blacks and whites in the North Carolina Exten-

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27. Stones v. Los Angeles Community College Dist., 572 F. Supp. 1072 (C.D. Cal. 1983), *aff'd*, 796 F.2d 270 (9th Cir. 1986).

28. Craft v. Board of Trustees of Univ. of Ill., 793 F.2d 140 (7th Cir. 1986).

29. Paisey v. Vitale, 634 F. Supp. 741 (S.D. Fla. 1986).

30. University of Tenn. v. Elliott, 106 S. Ct. 3220 (1986).

31. Elliott v. University of Tenn., 641 F. Supp. 24 (W.D. Tenn. 1984), *rev'd*, 766 F.2d 982 (6th Cir. 1986).

sion Service.[32] The Court found that the lower court had erred in disregarding plaintiff's multiple regression analysis because it took into account salary disparity existing prior to the passage of title VII.[33] The Court found that the existence of discriminatory disparity in salaries prior to the passage of title VII does not remove an obligation to eliminate the disparity after passage of the legislation. The Court remanded the case to the federal circuit court for a new determination based on the inclusion of plaintiff's multiple regression analysis along with other evidence previously considered.

In a case involving the award of damages where discrimination was found, the court ruled that the amount of the award hinged on whether the plaintiff was bringing suit based on the equal pay theory[34] or the *Gunther* theory.[35] Under the *Gunther* theory, the plaintiff can claim intentional wage discrimination based on sex without proving that she was paid less than a comparable male employee. Under this theory, damage may have commenced at the time of hiring. Under equal pay theory, she must show that there was disparity between her salary and that of a male doing the same work. In that case, the damages would be determined by the difference between the two salaries. The court vacated and remanded the decision for appropriate determination of damages.

Questions of tolling were again before the court. In one tolling case, a black custodial worker with an outstanding work record while a custodian charged discrimination in the decision to terminate his employment.[36] The plaintiff had been allowed to move to the landscape department where he garnered poor job performance evaluations which continued even after he was moved back to the custodial department. The court awarded a summary judgment in favor of the defendants since the plaintiff failed to file charges within the 180-day filing period. The start of the 180-day period was determined by the date of the alleged discrimination and plaintiff's awareness of its existence. The plaintiff also failed to produce any evidence that termination resulted because of his race.

Another tolling case involved the concept of the existence of a continuing violation which would allow filing even when 180 days had elapsed since the date the discrimination commenced.[37] The court, rejecting plaintiff's appeal from a remanded decision,[38] found that three factors must be present in continuation theory. First, the separate instances of discrimination must be of the same type; second, the alleged acts must recur; and, third, the acts must not have the degree of permanence which should trigger the plaintiff to assert his rights. The court found that the assignment of a teaching load was a one-time act of significant permanence requiring the immediate filing of a complaint, even though the consequences of the action continued through the semester in question. In a Vermont case, the court found that the notice of nonrenewal of a contract was not contaminated by any ambiguity in the institution's intentions, implicating continuation theory.[39]

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[32] Bazemore v. Friday, 106 S. Ct. 3000 (1986).
[33] Bazemore v. Friday, 751 F.2d 662 (4th Cir. 1984).
[34] Sellers v. Delgado College, 781 F.2d 503 (5th Cir. 1986).
[35] *Citing* County of Washington v. Gunther, 452 U.S. 161 (1981).
[36] Arna v. Northwestern Univ., 640 F. Supp. 923 (N.D. Ill. 1986).
[37] Berry v. Board of Supervisors of La. State Univ., 783 F.2d 1270 (5th Cir. 1986).

In a Delaware case, the court found that the filing time should begin tolling at the time the plaintiff became aware of the discrimination.[40] Plaintiff had no reason to doubt the validity of the institution's reason for not renewing his contract (i.e., to acquire someone with a doctorate until an advertisement in *The Chronicle of Higher Education* listed the job with the same degree requirements the plaintiff had). The institution's request for a summary judgment was denied. However, a charge of discrimination in the award of salaries was time barred.[41] The court also found that the spouse of the plaintiff lacked standing in the case.

Disparate treatment cases involve charges that the defendant has discriminated against the plaintiff because of her sex and that this is part of a pattern or practice against a protected class. In an Illinois case, a female temporary faculty member charged that the system of classifying faculty into two categories, temporary or regular faculty, was discriminatory.[42] The court found that the mere existence of a dual classification scheme would not constitute sex discrimination as long as similarly situated men and women were not treated differently. Furthermore, the court found a lack of individual cases of discrimination within the institution to support the class claim of disparate treatment. In Iowa, the Eighth Circuit Court of Appeals affirmed a lower court decision that the plaintiff was not promoted due to a lack of scholarly productivity, not because of his race.[43]

In a disparate impact case, a temporary white employee filed a discriminatory charge when the president of a black institution appointed a black female returning from a leave to the permanent full-time position for which plaintiff was an applicant.[44] This institution was under a 1978 court order to eliminate discriminatory hiring practices against whites.[45] The court found that, while the award of positions to employees returning from study leave was facially neutral, it served to perpetuate discriminatory employment practices having a disparate impact on white applicants. The numbers involved in study leaves in this case served to perpetuate the status quo of a racially lopsided work force. The plaintiff has shown that the reasons offered by the university were pretextual. The case was remanded to determine proper relief.

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[38] Berry v. Board of Supervisors of La. State Univ., 715 F.2d 971 (5th Cir. 1983).
[39] Shockley v. Vermont State Colleges, 793 F.2d 478 (2d Cir. 1986).
[40] Ohemeng v. Delaware State College, 643 F. Supp. 1575 (D. Del. 1986).
[41] Feng v. Sandrik, 636 F. Supp. 77 (N.D. Ill. 1986).
[42] Griffin v. Board of Regents of Regency Univ., 795 F.2d 1281 (7th Cir. 1986).
[43] Anderson v. University of N. Iowa, 779 F.2d 441 (8th Cir. 1985).
[44] Craig v. Alabama State Univ., 804 F.2d 682 (11th Cir. 1986).

In a unique case involving an institution operating under a consent decree,[46] the plaintiff alleged sex discrimination in the decision not to hire her.[47] In regard to a faculty position requiring approval of both the sociology and economics departments, the plaintiff was the third of three candidates recommended for the position. The first and second choices refused the position. At that point, the job description changed from a nontenured joint appointment to one that could be in one of the two departments and could be a tenure-track position. The court found this change to be within the requirements of the consent decree and advantageous to the plaintiff's candidacy, since the economics department had viewed her as an unqualified candidate. The committee had recommended the plaintiff only for a nontenured position and decided to reopen the search. The court noted that the consent decree under which Brown University was operating changed the way the shifting burden of proof was applied in this disparate impact case. The plaintiff satisfied the prima facie requirements, while the institution established valid employment reasons for its decision. The burden of proof strategies under the consent decree depart from the standard requirement at this point. In determining whether the reasons are pretextual, the burden of proof falls, because of the consent decree, on the institution. The institution must provide "clear and convincing evidence"[48] to show that the reasons are free of discriminatory pretext. The case was remanded for this determination.

Several other disparate impact cases turned on plaintiff's inability to prove sex discrimination as the reason for the institution's employment decision.[49]

Retaliation for a complaint alleging discrimination constituted another group of cases under title VII. In a discrimination case which has many elements of a retaliation case, in that the plaintiff was an employee of the institution, the court used the burden of proof standards used in retaliation cases.[50] The plaintiff alleged that the act of eliminating a tenure-track teaching position for which she had applied was retaliation. In establishing a prima facie case, plaintiff must show that she participated in protected activity, suffered an adverse employment decision, and demonstrated a causal relationship between the protected activity and the adverse employment decision.[51] Plaintiff met these three requirements and the burden then sifted to the institution to show nondiscriminatory reasons for the employment decision. The plaintiff then had to show that those reasons were pretextual. The court found that the plaintiff adequately substantiated the pretextual nature of the reasons. The final step in retaliation is that the institution has the burden of showing that the plaintiff would not have been hired regardless of the retaliatory intent of the employer. The case was remanded because the lower court erred in placing this burden on the plaintiff.

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[45] Craig v. Alabama State Univ., 451 F. Supp. 1207 (M.D. Ala. 1978).

[46] *See* The Yearbook of School Law 1983 at 296. Lamphere v. Brown Univ., 491 F. Supp. 232 (D.R.I. 1980), *aff'd*, 685 F.2d 743 (1st Cir. 1982).

[47] Lamphere v. Brown Univ., 798 F.2d 532 (1st Cir. 1986).

[48] *Id.* at 536.

[49] Wallace v. University of Mo., St. Louis, 624 F. Supp. 560 (E.D. Mo. 1986); Williams v. State Univ. of N.Y., 635 F. Supp. 1243 (E.D.N.Y. 1986).

A North Carolina case involved both a charge of discrimination in the award of a promotion to full professor and retaliation because she filed sex discrimination charges with the Chancellor.[52] The court found that the institution's reason, inadequate publications, was both valid and nonpretextual. Plaintiff could not hold failure to achieve promotion the second year as retaliation when her publication record remained unchanged.

A private liberal arts college was charged with hiring discrimination and retaliation against the plaintiff, a female employee.[53] Defendants, under a disparate treatment analysis, were able to show that the plaintiff was passed over for promotion because she lacked adequate supervisory skills—a legitimate, nondiscriminatory, nonpretextual, business reason. Furthermore, the court found that plaintiff's retaliation charges, the movement of her office, and reassignments to various divisions, were based on organizational and space concerns and were free of retaliatory motives. Defendants produced evidence that plaintiff's supervisors made an extra effort to accommodate plaintiff's complaints about location and space.

A night-time and weekend manager, who possessed a documented record of inadequate job performance, was unable to substantiate in court a holding of sex discrimination or retaliation in his employment termination.[54]

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[50] Ruggles v. California Polytechnic State Univ., 797 F.2d 782 (9th Cir. 1986).
[51] *Id.* at 785.
[52] Farlow v. University of N.C., 624 F. Supp. 434 (M.D.N.C. 1985).
[53] Gold v. Gallaudet College, 630 F. Supp. 1176 (D.D.C. 1986).
[54] Johnson v. Howard Univ., 641 F. Supp. 219 (D.D.C. 1986).

Several cases involved charges of religious discrimination at private church-affiliated institutions. In one case, the circuit court affirmed a lower court ruling.[55] The district court was correct in finding that the philosophy department's requirement that a faculty position be filled by a Jesuit priest was a "bona fide occupational qualification," given the nature of the institution and the department.[56]

A similar case involved an unsuccessful female applicant for a theology position at a Catholic university.[57] The woman charged discrimination in hiring based on sex and a violation of her first amendment rights resulting from her position on abortion. The first amendment claim failed because that same amendment prohibited the court from looking at hiring decisions in the theology department, which is so closely tied to the religious affiliation of the institution. Additionally, the concept of academic freedom, which is not a first amendment right, was not tied to hiring decisions. The title VII claim failed because the statute clearly exempts religious organizations from the requirements of the law. Involvement in the hiring decisions of the theology department would entangle the court in church doctrine, and therefore was prohibited by the Constitution.

In another religious discrimination case, the court found that the case was not ripe since E.E.O.C. had not taken a position on the discrimination charge, even though the state agency had found reasonable cause to believe discrimination may have occurred.[58]

The final case under title VII involved questions of who can be named in a suit under the statute. In a Kansas case, the court ruled that individual officers, along with the institution, are employers within the meaning of title VII and can be held liable in their official capacity, but cannot be personally liable.[59]

Equal Pay Act. Changes in technology necessitated changes in the employee categories of a union print shop at a university. In an attempt to keep costs competitive with nonunion shops, new collective bargaining agreements were negotiated with two job categories. These job categories, journeyperson printer and computer typist/paste makeup assistant, were paid at differential rates, even though similar tasks were performed by these two groups. Paste makeup assistants, as a class, brought this action alleging discrimination in pay in violation of Washington's Equal Pay Act which parallels the federal act.[60] The court noted that both the federal statute and the state law permitted differential pay on valid factors other than sex. In this case, the court found that job distinctions were necessary to phase out an outmoded job classification scheme while allowing the print shop to remain competitive. The job classifications had not been awarded based on sex and fit the exceptions to the law, a legitimate business reason. The court further noted that the salary to the journeyperson printers was not a gift of state money in violation of the state constitution.

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[55] *See* The Yearbook of School Law 1985 at 310; Prima (sic) v. Loyola Univ., 585 F. Supp. 435 (N.D. Ill. 1984).

[56] Pime v. Loyola Univ. of Chicago, 803 F.2d 351, 354 (7th Cir. 1986).

[57] Maguire v. Marquette Univ., 627 F. Supp. 1499 (E.D. Wis. 1986).

[58] Seattle Pacific Univ. v. Haas, 626 F. Supp. 539 (W.D. Wash. 1985).

[59] Barger v. Kansas, 630 F. Supp. 88 (D. Kan. 1985).

Title IX. Residuals from the *Cannon Case*[61] were in the court again. The circuit court, because of previous rulings,[62] upheld the district court's res judicata ruling in this case.[63] Previous court rulings on the matter of the denial of plaintiff's application for admission to medical school had already been litigated, fulfilling the requirements of the principal of res judicata. The court found plaintiff's filing of this complaint to be an "egregious and blatant violation" of Federal Rules of Civil Procedure and upheld the district court's ruling that defendant's attorneys' fees and costs be borne by the plaintiff. The court stated: "Mrs. Cannon's ten-year history of litigation demonstrates her penchant for harassing the defendants."[64]

A case on appeal from the district court[65] dealt with both title VII and title IX employment claims.[66] The plaintiff, the former women's basketball coach, failed to show that she was discriminated against in the assignment of tasks under title VII. She also failed to demonstrate that the athletic program was a program receiving federal funds under title IX. Citing *Grove City College*,[67] the court affirmed the district court's finding that the financial aid office, while having some record-keeping responsibilities, was not the primary administrator of athletic scholarships nor could infection theory justify compelling the athletic department's enforcement of title IX. A Texas case involving a student athlete reached a similar ruling.[68] A decision in this case had been put off earlier, pending the outcome of the *Grove City College* case.

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[60] Adams v. University of Wash., 722 P.2d 74 (Wash. 1986).

[61] *See* The Yearbook of School Law 1980 at 119, 200, Cannon v. University of Chicago, 441 U.S. 677 (1979).

[62] *See* The Yearbook of School Law 1982 at 238, Cannon v. University of Chicago, 648 F.2d 1104 (7th Cir. 1981); The Yearbook of School Law 1984 at 304, Cannon v. University Health Sciences/Chicago Medical School, 710 F.2d 351 (7th Cir. 1983); The Yearbook of School Law 1986 at 262, Cannon v. Loyola Univ. of Chicago, 609 F. Supp. 1010 (N.D. Ill. 1985).

[63] Cannon v. Loyola Univ. of Chicago, 784 F.2d 777 (7th Cir. 1986).

[64] *Id.* at 782.

[65] See The Yearbook of School Law 1986 at 247, O'Connor v. Peru State College, 605 F. Supp. 753 (D. Neb. 1985).

[66] O'Connor v. Peru State College, 781 F.2d 632 (8th Cir. 1986).

[67] *See* The Yearbook of School Law 1985 at 312, Grove City College v. Bell, 104 S. Ct. 1211 (1984).

Age Discrimination. A former dean, whose position was eliminated but who was retained as an instructor, sued alleging age discrimination in the filling of another administrative position.[69] The court noted that the mere hiring of a younger person does not yield a discriminatory finding. Furthermore, plaintiff could not establish a prima facie case where he failed to apply for the position.

In another case involving the age of the person hired, plaintiff was unable to show that the Ohio Civil Rights Commission decision emanating from his age discrimination claim was arbitrary and capricious.[70] The Commission ruled that the fact that a younger person was hired to fill the associate professor's position was not enough, standing alone, to reach a finding of age discrimination.

A Wisconsin case involved a claim of age discrimination and retaliation in the termination of an employee.[71] An arbitrator's determination, pursuant to the collective bargaining agreement, of lack of just cause for termination did not have a preclusive effect. The findings of an unemployment compensation hearing also were not preclusive. The plaintiff failed to show that the institution's decision was retaliation for a suit filed by her son. In Kentucky, a court ruled that a plaintiff was entitled to an evidentiary hearing on her dismissal as a registrar.[72]

Nontenured Faculty

Nontenured faculty continue to bring claims for alleged violations of first amendment rights, due process, and equal protection claims in an institution's failure to renew contracts or to grant tenure. Part-time faculty issues also are reviewed.

First Amendment Freedom of Speech. A faculty member, who used profanities during his lectures and was warned and subsequently dismissed after the completion of prescribed administrative procedures, brought a suit alleging violation of his first amendment rights, among others.[73] At trial, the jury found for the plaintiff on his first amendment speech and equal protection claims. The district court granted judgment n.o.v. for the defendant institution because of a lack of evidence to support the jury's conclusions. On appeal, the Fifth Circuit Court found that the first amendment does not protect profanity. The court noted that free speech rights must be balanced against those of the audience. Also, the district court dismissed the equal protection claim since there was no evidence of differential treatment from similarly situated individuals.

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[68] Bennett V. West Tex. State Univ., 799 F.2d 155 (5th Cir. 1986); *see* Bennett v. West Tex. State Univ., 525 F. Supp. 77 (N.D. Tex. 1981), *rem'd*, 698 F.2d 1215 (5th Cir. 1983), *cert. denied*, 466 U.S. 903 (1984).

[69] Greaves v. Jefferson State Junior College, 494 So. 2d 409 (Ala. 1986).

[70] McCrea v. Ohio Civil Rights Comm'n, 486 N.E.2d 143 (Ohio Ct. App. 1984).

[71] Johnson v. University of Wis.-Milwaukee, 783 F.2d 59 (7th Cir. 1986).

[72] Clifton v. Midway College, 702 S.W.2d 835 (Ky. 1986).

In another first amendment case, a staff member may have been dismissed for "whistleblowing."[74] After several years of outstanding job performance evaluations, relationships began to deteriorate after plaintiff called to the attention of his superiors a faculty member's inappropriate financial dealings with institutional money. While a procedural due process claim was not substantiated by the plaintiff, the substantive due process claim of a violation of first amendment rights was remanded for further determination. A public employee's disclosures of financial improprieties to his supervisor has long been recognized as protected speech. The fact that he expressed those views privately did not diminish his first amendment rights.

Nonrenewal Procedures. This section contains controversies alleging discrimination, the existence of property rights, and breach of contract when institutions failed to renew contracts or acted to deny tenure to faculty.

In Pennsylvania, an Arab-American associate professor was denied tenure and filed title VII and 42 U.S.C. sections 1981 and 1983 claims and other state claims for discrimination based on race.[75] The district court, on a motion for summary judgment, ruled that the title VII claim was time barred while the section 1981 and section 1983 claims should be adjudicated. The federal circuit court affirmed the lower court decision. Specifically, they found that the term "race," under the law, is loosely defined by Congress to mean Arab or any other group which is ethnically or physiologically distinct. Furthermore, the court noted that the change in the statute of limitations should not be applied retroactively in this case; therefore, the section 1981 claim was not time barred.

In another case, a faculty member whose two-year contract was not renewed after several negative teaching evaluations sued for breach of contract and defamation.[76] The court found that no obligation was owed to the plaintiff beyond the contract period. The defamation claim was dismissed because he had agreed to the evaluations as part of the employment contract and could not now allege defamation because the evaluations were negative. The court found the consent privilege to be an absolute bar to the plaintiff's claims and the comments in the evaluations not to be defamatory. In a similar case, a liberty interest was not implicated when reasons were provided, as per the contract, for nonrenewal.[77] In a Utah case, a faculty member was unsuccessful in the retroactive application of a statute which required a hearing for a nonrenewal decision.[78]

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[73] Martin v. Parrish, 805 F.2d 583 (5th Cir. 1986).

[74] Brown v. Texas A & M Univ., 804 F.2d 327 (5th Cir. 1986).

[75] Al-Khazraji v. Saint Francis College, 784 F.2d 505 (3d Cir. 1986), *cert. granted in part*, 107 S. Ct. 62 (1986).

In Ohio, the court found that the institution had met its burden of providing a nondiscriminatory reason, poor scholarship, for not awarding tenure while plaintiff failed in her burden of showing "appropriate scholarship."[79] A number of cases had similar results where the plaintiff failed to show that the institution's action violated protected rights.[80]

A faculty member alleging sex discrimination requested discovery of the contents of outside reviewers' letters of recommendation, the institutions record of discrimination in other areas such as its relationship with students, the records of schools which have associations with the defendant institution, and the records for all faculty members who have received tenure at the institution.[81] In a federal rules decision, the district court affirmed the magistrate's denial of discovery on all requests except the final one. The court granted the plaintiff's discovery request on all faculty members granted tenure from the period 1974 to 1984 instead of the three-year period granted by the magistrate.

In another discovery case, the court reviewed the issue of academic freedom of tenure review committees and the plaintiff's need to review critical records in an attempt to build a case for discrimination.[82] The court noted the discrepancy within the circuit courts on this matter. They reviewed the Seventh[83] and the Second[84] Circuit Courts' decisions, which attach restrictions to plaintiff's access to information on the tenure decision and balance the rights of confidentiality of the institution's deliberations against the rights of the plaintiff to mount a case. However, the court agreed with the Fifth[85] and the Third[86] Circuit Courts, which held that plaintiff only must show relevance as described in the discovery rule in order to get access to committee votes and deliberations in committee promotion and tenure decisions.

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[76] Baker v. Lafayette College, 504 A.2d 247 (Pa. Super. Ct. 1986).

[77] Lovelace v. Southeastern Mass. Univ., 793 F.2d 419 (1st Cir. 1986).

[78] Moore v. Utah Technical College, 727 P.2d 634 (Utah 1986).

[79] Gutzwiller v. Fenik, 645 F. Supp. 363 (S.D. Ohio 1986).

[80] Singh v. Lamar Univ., 635 F. Supp. 737 (E.D. Tex. 1986); Smith v. State, 389 N.W.2d 808 (N.D. 1986); Storrer v. University of S.C., 343 S.E.2d 664 (S.C. Ct. App. 1986); Thornquest v. King, 626 F. Supp. 486 (M.D. Fla. 1985); Waring v. Fordham Univ., 640 F. Supp. 42 (S.D.N.Y. 1986); Weinstein v. University of Ill., 628 F. Supp. 862 (N.D. Ill. 1986); Williams v. Weaver, 495 N.E.2d 1147 (Ill. Ct. App. 1986).

[81] Jackson v. Harvard Univ., 111 F.R.D. 472 (D. Mass. 1986).

[82] Rollins v. Farris, 108 F.R.D. 714 (E.D. Ark. 1985).

[83] *See* The Yearbook of School Law 1984 at 282, E.E.O.C. v. University of Notre Dame du Lac, 715 F.2d 331 (7th Cir. 1983).

[84] *See* The Yearbook of School Law 1983 at 305, Gray v. Board of Higher Educ., 692

A district court case, on remand, involved a determination of whether a property right existed based on a state contract. The court determined that Rutgers University, because of its extensive private funding sources, lacked sovereign immunity under the eleventh amendment.[87]

In Illinois, a professor had signed a contract which promised to recommend tenure the next fall. The dean failed to submit the tenure request in a timely manner and a new dean sent the plaintiff a letter of nonrenewal.[88] The court found that the trial court evidence supported a finding that the plaintiff would have received tenure but for the error of the dean. However, the trial court erred in awarding damages beyond the date of trial. In another contract case, the court ruled that the lower court erred in finding that the school owed the faculty member a tenured appointment.[89] Regardless of the definition of a visiting professor in the faculty handbook, the school could enter into a contract agreement to hire the plaintiff as a visiting professor under different conditions as long as that was clearly stated in the terms of the contract. Therefore, plaintiff was not in a full-time tenure track position long enough to qualify for automatic tenure. A Pennsylvania breach of contract case was remanded for a consideration of whether affirmative action statements in the faculty handbook required that gender be a positive factor in promotion and tenure considerations under the employment contract.[90]

In a denial of tenure case, a plaintiff was able to substantiate bias based on sex at a grievance before an institutional committee. The plaintiff was guaranteed that, in a second tenure review, those with bias would be removed from the review process. However, at the depart-

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F.2d 901 (2d Cir. 1982).

[85] *See* The Yearbook of School Law 1982 at 264. *In re* Dinnan, 661 F.2d 426 (5th Cir. 1981).

[86] *See* The Yearbook of School Law 1986 at 245. E.E.O.C. v. Franklin and Marshall College, 775 F.2d 110 (3d Cir. 1985).

[87] Kovats v. Rutgers, 633 F. Supp. 1469 (D.N.J. 1986); *see* The Yearbook of School Law at 246, Kovats v. Rutgers, 749 F.2d 1041 (3d Cir. 1984).

[88] Lewis v. Loyola Univ. of Chicago, 500 N.E.2d 47 (Ill. Ct. App. 1986).

[89] Tetlow v. Loyola Univ. of New Orleans, 483 So. 2d 1242 (La. Ct. App. 1986).

[90] Sola v. Lafayette College, 804 F.2d 40 (3d Cir. 1986).

mental level, those with bias, having participated in the previous decision, voted to deny tenure. The plaintiff immediately filed this action. The court ruled that the full tenure review process should be completed prior to judicial intervention.[91] In the final case of this section, in the courts since 1972,[92] the plaintiff may have exhausted the last avenue of litigation. The state court ruled that the plaintiff's state claims were time barred.[93]

Tenured Faculty

A number of cases in this section involved the termination of tenured faculty for cause. First amendment claims and denial of employee privileges also are reviewed.

Termination for Cause. The reasons for termination in the cases reviewed included charges of plagiarism and failure to perform assigned duties. Several cases also alleged defamation claims resulting from the termination letter. In a Minnesota case,[94] a tenured faculty member at a public institution was charged with plagiarism on a laboratory manual he had written for his class. He was disciplined but not dismissed for that offense. Later, a group of students filed a grievance against him, charging a lack of moral integrity in the plagiarism incident, incompetence as a teacher, harassment of students, and unprofessional conduct. Following the procedures outlined in institutional documents, a hearing and appeals procedure eventually resulted in termination of the plaintiff's employment. The Eighth Circuit Court found that res judicata would not apply to this case, based on previous disciplinary action for the plagiarism charge. Plaintiff failed to show a prima facie case of discrimination based on race, that he was treated any differently than a similarly situated faculty member under the equal protection provisions, or that due process requirements had not been met.

In a Tennessee case,[95] a faculty member who failed to perform assigned tasks was absent from the institution without a doctor's excuse and was eventually terminated. Following the institutional procedures in dismissal, the court found that the institution's decision to terminate was based on evidence and was not arbitrary and capricious.

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[91] Snitow v. Rutgers Univ., 510 A.2d 1118 (N.J. 1986).

[92] *See* The Yearbook of School Law 1983 at 304, Skehan v. Board of Trustees of Bloomsburg State College, 669 F.2d 142 (3d Cir. 1982), *rehr'g denied*, 675 F.2d 72 (3d Cir. 1982), *cert. denied*, 459 U.S. 1048 (1982).

[93] Skehan v. Bloomsburg State College, 503 A.2d 1000 (Pa. Commw. Ct. 1986).

[94] Agarwal v. Regents of Univ. of Minn., 788 F.2d 504 (8th Cir. 1986).

[95] Josberger v. University of Tenn, 706 S.W.2d 300 (Tenn. Ct. App. 1985).

In an Alabama case,[96] a faculty hearing committee found the plaintiff guilty as charged, but recommended probation. In dicta, the state supreme court indicated that, while the plaintiff's right to have an attorney present for the hearing was not before the court, it probably was not a requirement in due process. Furthermore, the court found it appropriate for the President to consult the plaintiff's employment file in arriving at the decision to terminate employment.

In a Wisconsin case,[97] the state supreme court reversed a lower court ruling[98] which required a name-clearing hearing. The basis for the reversal was that the plaintiff had failed to complete the institution's appeals process, exhausting the administrative remedies, before filing the claim. In an Indiana case,[99] the court found no error in the institution's dismissal procedures and decision to terminate a tenured faculty member. The institution complied with the state open-door law during the conduct of the hearing. The evidence clearly indicated the professor's failure to fulfill his teaching responsibilities in both practice and content of the courses taught. The first amendment and tort claims were not substantiated.

In a Pennsylvania case,[100] the court found that the eleventh amendment immunity provisions applied to a public college. The court noted that the remedy sought for termination could be provided by an arbitrator, as defined in the collective bargaining agreement, and that plaintiff should have exhausted administrative remedies prior to pursuing litigation.

Defamation charges emanated from a letter notifying the plaintiff that the result of a hearing was termination.[101] The court found that a letter of termination which communicated the results of a quasi-judicial hearing was privileged communication not subject to a charge of defamation.

Denial of Employee Privileges. Several cases involved physicians who engaged in private practice while serving as faculty of a teaching hospital. An Illinois case involved plaintiff's claim that the institution was forcing him out of his tenured position by denying him certain privileges.[102] The plaintiff alleged that the institution failed to assign him patients and research assistants, made his salary dependent on patient-generated income, removed his name from publications, and moved him out of his laboratory. The court held that this case hinged on the conditions of the tenure contract. On remand, plaintiff would be allowed to amend his claim to include the appropriate contract information.

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[96] Johnson v. Alabama Agricultural & Mechanical Univ., 481 So. 2d 336 (Ala. 1985).

[97] Kramer v. Horton, 383 N.W.2d 54 (Wis. 1986).

[98] *See* The Yearbook of School Law 1986 at 252, Kramer v. Horton, 371 N.W.2d 801 (Wis. Ct. App. 1985).

[99] Riggin v. Board of Trustees of Ball State Univ., 489 N.E.2d 616 (Ind. Ct. App. 1986).

[100] Wynne v. Shippensburg Univ., 639 F. Supp. 76 (M.D. Pa. 1985).

[101] Webster v. Byrd, 494 So. 2d 31 (Ala. 1986).

[102] Williams v. Northwestern Univ., 497 N.E.2d 1226 (Ill. Ct. App. 1986).

A faculty member was charged with sexual harassment and discrimination of female students. These charges were placed in the faculty member's folder and he was reassigned to teach another class. The state court issued a writ of mandamus and the information was removed from plaintiff's personnel record. The Ninth Circuit Court found that the doctrine of res judicata applied to any claims previously litigated in state court and remanded the case for a determination of other claims outside the adjudicated state claims.[103]

In an Arizona case, a faculty member filed a claim when his salary was reduced after he stepped down from an administrative position.[104] The court found that the plaintiff's claim failed in light of university policy.

In Pennsylvania, a faculty member sued when an employment conflict arose over commitments he had made outside the institution after he had applied for early retirement but before the institution acted on the application.[105] University rejection of his application, as allowed by the retirement policy, where the applicant inappropriately relied on approval could not result in institutional liability.

A law professor represented a group in a suit against the city resulting in a resolution at city council alleging that he had improperly used state funds. The law professor sued and the court found that the city council resolution was not a bill of attainder nor had it harmed the relationship between the professor and his employer.[106] Plaintiff failed to show constitutional violations, and the district court dismissed the case. The Eleventh Circuit Court found that the plaintiff had valid first amendment and due process claims which could be litigated under 42 U.S.C. section 1983.[107]

Several cases involved defamation claims resulting from denial of privileges. A faculty member who was denied promotion charged his department chair with libel and slander for an adverse memo to the promotion committee which called attention to the inadequate publication record of the plaintiff.[108] Defendant's department chair's statements were based on fact and amounted to the expression of opinion covered by constitutional privilege. In a Washington case, a faculty member charged defamation, violation of free speech, and actions that had a chilling effect on future speech as a result of action by his department.[109] The plaintiff's department had voted to reprimand him for inappropriate response to interdepartmental activities. Unrelated to this action was plaintiff's grievance over space and pay. The state supreme court affirmed the lower court judgment against the plaintiff, required him to bear costs, and stated:

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[103] Clark v. Yosemite Community College Dist., 785 F.2d 781 (9th Cir. 1986).
[104] Franken v. Arizona Bd. of Regents, 714 P.2d 1308 (Ariz. Ct. App. 1986).
[105] Havas v. Temple Univ., 516 A.2d 17 (Pa. Super. Ct. 1986).
[106] Little v. City of N. Miami, 624 F. Supp. 768 (S.D. Fla. 1985).
[107] Little v. City of N. Miami, 805 F.2d 962 (11th Cir. 1986).

> The issues in this case have been going on longer than this specific action. The lengthy record sets out a picture of bickering adults. The courts are an inappropriate forum in which to settle a personal squabble among professional colleagues; the plaintiff's case has no merit. The award of attorney fees is affirmed.[110]

Termination Due to Financial Exigency or Program Elimination. In a Kansas case, the plaintiff was able to show that her contract was breached, and the case was remanded for a new trial.[111] The plaintiff was dismissed because of a financial exigency and the institution, within the two-year time period after that action, filled a position in the plaintiff's area. In a California layoff case,[112] the court found that another faculty member with a split appointment had seniority over the plaintiff. The court noted that, by definition within the contract, seniority goes to the individual and would not be split between the various appointments held by the individual. Additionally, plaintiff's application for credentials to teach math with the resulting layoff of math teachers was not timely since it was made after the date layoff notices must be forwarded to affected faculty.

In a dismissal resulting from declining enrollment, the plaintiff was unable to support a claim that dismissal was due to protected speech.[113] In another financial exigency case, the court refused to issue a summary judgment.[114] The court found sufficient facts to warrant the determination at trial of whether a financial exigency was the factor in the dismissal of a sixty-two year old professor. In Idaho, the state had adequately established a financial exigency to warrant the layoff of the plaintiff.[115]

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[108] Belliveau v. Rerick, 504 A.2d 1360 (R.I. 1986).
[109] Meyer v. University of Wash., 719 P.2d 98 (Wash. 1986).
[110] *Id.* 104.
[111] Vandever v. Junior College Dist., 708 S.W.2d 711 (Mo. Ct. App. 1986).
[112] Vassallo v. Lowrey, 224 Cal. Rptr. 357 (Cal. Ct. App. 1986).
[113] Hamer v. Brown, 641 F. Supp. 662 (W.D. Ark. 1986).
[114] Linn v. Andover Newton Theological School, 642 F. Supp. 11 (D. Mass. 1985).
[115] Milbouer v. Keppler, 644 F. Supp. 201 (D. Idaho 1986).

In a case on remand,[116] the federal district court found that due process had been guaranteed to a plaintiff removed in the middle of a one-year contract.[117]

The agricultural extension office at a state institution declared a financial exigency, dismissing the plaintiff a year before she was eligible for voluntary retirement. The extension office later in the year came up with a surplus in its budget. The lower court found that the defendant institution had failed to prove the existence of a financial exigency. On appeal, the Idaho Supreme Court held that the burden of proving the existence of a financial exigency rests with the institution and that substantial evidence existed to show that the institution failed in its burden of proof.[118]

Denial of Employee Benefits. Several cases in this section deal with whether certain employee benefits are subject to either federal withholding or social security tax. A private college challenged the federal government's right to retroactively assess FICA deductions against money put into an employee's retirement annuity contract. The 1984 Deficit Reduction Act applied retroactively to FICA taxes paid. Legislation in 1983 "decoupled" FICA and income tax and required the payment of FICA tax on retirement annuity contributions in conflict with 1964 revenue regulations. This conflict, adjudicated in previous litigation,[119] raised the potential for this refund challenge. The congress, through 1984 legislation, attempted to close the refund option by retroactive application of the provisions. This decision upheld the retroactive provisions as constitutional.[120] The retroactive enforcement of an already collected tax was not a harsh and oppressive action when measured against a public benefit. In an Ohio case involving a private university, the employee retirement annuity contribution by a tax-exempt employer was subject to FICA tax.[121] Another case involved fringe benefits as taxable income requiring withholding.[122] The court found that fringe benefits such as parking space, recreation center membership, and tuition payments of an employee's children's high school tuition costs were deducted from annual wages, making them part of gross wages for income withholding purposes. The court also found that fellowship awards to faculty for summer research projects were also wages requiring withholding. Two other cases had the same result for an annuity contract[123] and funds to defray tuition expenses of an employee's children.[124]

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[116] *See* The Yearbook of School Law 1985 at 325, Russell v. Harrison, 736 F.2d 283 (5th Cir. 1984).

[117] Russell v. Harrison, 632 F. Supp. 1436 (N.D. Miss. 1986).

[118] Pace v. Hymas, 726 P.2d 693 (Idaho 1986).

[119] Rowan Companies Inc. v. United States, 452 U.S. 247 (1981).

[120] Canisius College v. United States, 799 F.2d 18 (2d Cir. 1986).

[121] Xavier Univ. v. United States, 633 F. Supp. 15 (S.D. Ohio 1986).

[122] Marquette Univ. v. United States, 645 F. Supp. 1007 (E.D. Wis. 1985).

A challenge to a widow's payment of federal tax on money received from retirement plan life insurance was litigated. The Seventh Circuit Court ruled that retirement system survivor's insurance was not a "life insurance contract" equaling an exemption from gross income for tax purposes.[125]

In a Virginia case, the federal circuit court refused to grant a tax exemption for a priest's income from a secular university.[126] The court rejected the priest's claim that he was an agent of a tax exempt religious order.

In another case, the court upheld the demotion of a civil service employee.[127] The court found the evidence of extensive illness resulting in insufficient delivery of service to be substantiated and the hearing procedures to be fair. An Arizona court found that the plaintiff, a classified staff employee, had no contractual right to reclassification.[128] In a New Hampshire case, the court found a food service employee was eligible for unemployment compensation when she was laid off during the summer months but told she must be on call in order to keep her job.[129] In Montana, a university employee was a farm worker exempt from the overtime provisions of the Minimum Wage and Overtime Act.[130]

Administrators and Staff

Cases involving termination, breach of contract, first amendment rights, and defamation were litigated during the last year. In Colorado, a department head was unable to support a defamation claim against faculty who published a memorandum outlining reasons for his requested removal.[131] However, a slander suit against an individual who held an administrative position at a private college was successful.[132] At a dinner meeting on institutional business, the officer erroneously reported to others that the dean of students was an ex-convict. The dean of students was able to substantiate that this rumor eventually resulted in the loss of his position. In a Texas case, the pronouncements about a supervisor written in a "secret diary" which fell into the hands of the supervisor were not protected speech under the first amendment.[133] Communications on matters involving a personal employee dispute which are not matters of "public concern" are not constitutionally protected speech barring plaintiff's termination.

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[123] Western Reserve Academy v. United States, 801 F.2d 250 (1986).
[124] John Carroll Univ. v. United States, 643 F. Supp. 675 (N.D. Ohio 1986).
[125] Barnes v. United States, 801 F.2d 984 (7th Cir. 1986).
[126] Fogarty v. United States, 780 F.2d 1005 (Fed. Cir. 1986).
[127] Hahn v. University of Cincinnati, 489 N.E.2d 1081 (Ohio C.P. 1985).
[128] Duke v. Arizona Bd. of Regents, 721 P.2d 1159 (Ariz. Ct. App. 1986).
[129] *In re* Locke, 503 A.2d 754 (N.H. 1985).
[130] Terry v. Board of Regents of Higher Educ., 714 P.2d 151 (Mont. 1986).
[131] Dominguez v. Babcock, 727 P.2d 362 (Colo. 1986).
[132] Joseph v. Elam, 709 S.W.2d 517 (Mo. Ct. App. 1986).

A former associate dean and department head alleged that harassment resulting in his constructive discharge was a violation of his first amendment rights.[134] The plaintiff alleged that officials failed to deal with the harassment of another faculty member in the plaintiff's department. The court found the discharge claim on the associate dean's position to be time barred, and that the supervisors were not negligent in their responsibility to supervise the plaintiff.

In a North Carolina case,[135] the court found adequate reasons and due process in the removal of the director of student activities. The director was accused of personal misconduct when he called a meeting of all directors to discuss the dean of student's managerial skills while the dean was out of town. The court found no procedural error in the dean's discussion of the matter, prior to his dismissal decision, with the State's Personnel Commission, which subsequently heard the appeal.

A Florida court remanded to the administrative hearing agent a request for a hearing on plaintiff's removal from the dean of education position.[136] In a Puerto Rican case, the court found that a faculty member was removed because of his national origin, not ineffective leadership. [137] The court ordered the faculty member reinstated and officials were enjoined from further harassment. In a Georgia case, the court found that because a researcher worked on a grant application the university is not obligated to retain the research assistant until the grant is completed.[138]

In an Arizona case, the court found that the institution could be held to a four-year verbal contract with the basketball coach.[139] The court noted that state law, which limits the contracting authority of certain state institutions to a one-year period, could not be relied on when the tenure policy violated those provisions. Furthermore, the so-called "fiscal out" provisions could not be relied on, since the legislature has continued to fund the basketball position at the institution.

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[133] Terrell v. University of Tex. Sys. Police, 792 F.2d 1360 (5th Cir. 1986).

[134] Kline v. North Tex. State Univ., 782 F.2d 1229 (5th Cir. 1986).

[135] Leiphart v. North Carolina School of The Arts, 342 S.E.2d 914 (N.C. Ct. App. 1986).

[136] Tuckman v. Florida State Univ., 489 So. 2d 133 (Fla. Dist. Ct. App. 1986).

[137] Vargas Figueroa v. Saldana, 646 F. Supp. 1362 (D.P.R. 1986).

[138] Tidwell v. Emory Univ., 349 S.E.2d 245 (Ga. Ct. App. 1986).

[139] University of Ariz. v. County of Pima, 722 P.2d 352 (Ariz. Ct. App. 1986).

In a controversy involving the termination of the president of a state university, the federal district court remanded the case to the state court as the eleventh amendment barred subject matter jurisdiction.[140] In another case, the president's secretary did not have a property right in her continued employment requiring due process.[141] Even though the letter of appointment stated that "permanent employment" would be awarded after a probationary period was served, this contract was of unlimited duration and could be terminated at will unless prohibited by expressed limitations in the contact.

A black public safety officer who was dismissed for a charge of sexual harassment was able to support a claim of retaliation.[142] The plaintiff had filed a complaint with the Human Rights Commission when he was bypassed in a promotion decision. The evidence indicated that the plaintiff was dismissed for verbal sexual harassment while three white employees were only given a warning for sexual harassment which involved touching the victim.

The court found that the institution's grievance procedures satisfied due process requirements in the dismissal of a custodial employee and failure to file a grievance after termination constituted a waiver. [143] The head of a public safety office was dismissed for failure to perform the duties of the position. The court found the procedure for termination and the reason did not violate any constitutional guarantees. [144]

Collective Bargaining

In a Pennsylvania case, the employees' association challenged a state labor relations board ruling that the State System of Higher Education was the sole authority in the conduct of collective bargaining agreements with the thirteen public colleges and universities.[145] The court found that legislation creating the state system gave them sole authority in collective bargaining. In a third case involving authority to bargain, the city of Philadelphia claimed that the employees of a college were city employees where the city was named the trustee.[146] The controversy centered on sick-leave payments as part of severance, agreed to in the college's collective bargaining agreement but prohibited by city code for municipal employees. Failure to repudiate the collective bargaining agreement earlier required acceptance of its provisions as claimed at bar.

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[140] South Dakota Bd. of Regents v. Hoops, 624 F. Supp. 1179 (D.S.D. 1986).

[141] Wright v. Cayan, 642 F. Supp. 947 (N.D.N.Y. 1986).

[142] Loyola Univ. v. Human Rights Comm'n, 500 N.E.2d 639 (Ill. App. Ct. 1986).

[143] Riggins v. Board of Regents of Univ. of Neb., 790 F.2d 707 (8th Cir. 1986).

[144] Robinson v. Boyer, 643 F. Supp. 975 (N.D. Miss. 1986).

[145] Board of Governors of the State Sys. of Higher Educ. v. Commonwealth, 514 A.2d 223 (Pa. Commw. Ct. 1986).

[146] City of Philadelphia v. Local 473, 508 A.2d 628 (Pa. Commw. Ct. 1986).

A Michigan case raised the issue of what constituted chargeable fees for nonmembers.[147] The court found that bargaining unit expenses for organizing lobbying efforts germane to responsibilities as bargaining representative, and litigation related to duties as legal representative of employees, were found to be chargeable. A loan to another affiliated union was not chargeable. Also, the court found that the formula to assess the amount of chargeable dues paid to state (MEA) and national (NEA) umbrella organizations was defective as it pertained to chargeable and nonchargeable expenses.

An Ohio custodial union challenged the university's right to freeze hiring and then contract with an independent corporation for custodial services. The state supreme court had ruled that the contracts entered into while the institution was under a hiring freeze were illegal and must be nullified.[148] In this decision, the court found that contracts negotiated after the hiring freeze ended can be performed unless they are found to violate the current collective bargaining agreement.[149]

In California, the state supreme court overturned a lower court decision.[150] The court ruled that the medical staff participating in a residency program at the hospital were employees entitled to collective bargaining rights.[151] In another California case, the court ruled that allowing a union to display a banner on campus during an organization campaign would violate the prohibition of showing favoritism to one employee union.[152] The unions were provided space on campus to campaign, but allowing one union to use the designated banner display location would show favoritism.

Several cases involved grievances. In one case, the court upheld an arbitrator's authority to provide plaintiff with the opportunity to teach classes in math.[153] The plaintiff had grieved her reassignment from teaching to tutoring. However, the court would not uphold the arbitrator's award of damages since there was no financial loss. In an Illinois grievance case, the plaintiff's nutrition class was given to the department chair so she would have something to teach and plaintiff was declared unqualified to teach nutrition. The trial court ruled that the qualifications to teach a course were not an arbitratable issue. On appeal, the case was remanded for a decision on the merits since plaintiff did have a grievable issue.[154]

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[147] Lehnert v. Ferris Faculty Ass'n—MEA-NEA, 643 F. Supp. 1306 (W.D. Mich. 1986).

[148] Local 4501, Communications Workers of Am. v. Ohio State Univ., 466 N.E.2d 912 (Ohio 1984).

[149] Local 4501, Communications Workers of Am. v. Ohio State Univ., 494 N.E.2d 1082 (Ohio 1986).

[150] *See* The Yearbook of School Law 1985 at 328, Regents of the Univ. of Cal. v. Public Employment Relations Bd., 205 Cal. Rptr. 49 (Ct. App. 1984).

[151] Regents of Univ. of Cal. v. Public Employment Relations Bd., 715 P.2d 590 (Cal. 1986).

[152] Regents of Univ. of Cal. v. Public Employment Relations Bd., 223 Cal. Rptr. 127 (Ct. App. 1986).

In a salary dispute, the Illinois court ruled that pay for a holiday was an inappropriate "dock" during an illegal strike.[155] The college could not count the holiday when it did not deduct Saturdays and Sundays in its formula to arrive at the "dock" amount. In termination disputes, courts in California and Illinois found that a faculty member's and a security guard's due process rights could not be bargained away in the provisions of a collective bargaining agreement.[156] Finally, a State Workers' Compensation Act did not shield the employer from a claim of intentional infliction of emotional distress, and material facts existed to require litigation.[157]

STUDENTS

Litigation brought by students is again diverse. Nonresident tuition cases continue to receive attention. Financial aid cases include loan defaults and cases surrounding the denial of veterans' benefits. Disciplinary dismissal cases continue to be active, while the courts continue to favor deference in academic dismissal litigation. First amendment litigation continues to cover the issues of free expression, free speech, and separation of church and state. Admission issues include a family dispute with a law school and a case against a tutoring service for those preparing to take standardized tests.

Admissions

A dispute between a family and a private university involved the denial of admission to three members of the family. In a series of litigations, the three family members claimed that they were discriminated against in the admissions process because of their affiliation with causes of blacks and the activities of their father's law firm. Specifically, the plaintiffs alleged violations of 42 U.S.C. sections 1981, 1983, 1985, and 2000d, and the first and fourteenth amendments in the admissions process. In a series of opinions, in which there were obvious errors in the assignment of volume numbers at the time of publication in the reporter system, the court took the following actions. On February 10, 1986, the district court reviewed the case, analyzed the admissions process, and reviewed evidence on the retaliation claims. The court granted a summary judgment to the defendant institution, finding that the admission decisions were based on sound and fair procedures and free of bias.[158] In another action, the same plaintiffs alleged the same claims, previously litigated, while adding allegations of wrongful denial of their right to a grievance process. The district court found in an April decision that all the claims previously litigated were barred by the doctrine of res judicata.[159] The plaintiffs' claims under the equal protection clause and 42 U.S.C. section 1985 were sufficient to proceed with additional litigation on the issues.

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[153] Beaver County Community College v. Society of the Faculty, 513 A.2d 1125 (Pa. Commw. Ct. 1986).

[154] Board of Trustees v. Cook County College Teachers, 487 N.E.2d 956 (Ill. Ct. App. 1985).

[155] Allen v. Board of Trustees of Belleville Area, 494 N.E.2d 1168 (Ill. Ct. App. 1986).

[156] Phillips v. California State Personnel Bd., 229 Cal. Rptr. 502 (Ct. App. 1986); Pundt v. Millikin Univ., 496 N.E.2d 291 (Ill. App. Ct. 1986).

[157] Walters v. President of Harvard College, 645 F. Supp. 100 (D. Mass. 1986).

The requirement that college students pass the Texas Education Agency's Pre-Professional Skill Test (PPST) before enrolling for more than six hours of professional education courses at any state college or university was challenged by an intervenor representing two sets of minority groups, one composed of elementary and secondary students and the other of college students who desired to take education courses. The group challenged this requirement because the passing rate for minority-group students who take the PPST is, on average, much lower than the passing rate for white students. The district court[160] issued a preliminary injunction requiring the Texas Education Agency to permit students who would have been qualified to enroll in education courses, but for their having failed the PPST, to do so. On appeal, the Fifth Circuit Court[161] found error in the lower court decision because it had not determined the validity of the test in measuring basic skills essential to satisfactory performance in teacher-education courses. The order for a preliminary injunction was reversed, and the intervenor's claims under the equal protection clause and title VI should proceed to trial on the merits.

In a related admission case, the Educational Testing Service (ETS), a nonprofit educational organization that prepares and administers numerous standardized tests used in admissions, was granted a preliminary injunction that enjoined a corporation which tutored students preparing to take standardized admission tests.[162] The injunction sought to stop the corporation from a wide range of activities involving ETS's tests and information. In 1982, ETS learned that a tutoring corporation had given to its clients "Math Level I" and "English Composition" Achievement tests that were stolen from ETS. However, this complaint contained no allegation of theft. ETS and the corporation entered into a written agreement to return all copies of the purloined tests, to refrain from copying or distributing any ETS-copyrighted or copyrightable materials, and to assist ETS if stolen material should come into the corporation's possession. In May of 1985, ETS claimed that the corporation used a "Math Level I" practice test which was copied from the same stolen test book used in 1982. ETS contends that defendant's actions constituted infringement of ETS's copyrights, breach of the 1983 agreement, and interference with "ETS's common law right to preserve the integrity of its testing program and the confidentiality of its secure test questions." On appeal, the Third Circuit Court[163] found that the similarity of questions used by the corporation substantiated the copyright violation claims and affirmed that part of the injunction. However, the part of the injunction on the breach of contract claim was reversed, and the claim was ordered to trial on the merits.

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[158] Phelps v. Washburn Univ., 634 F. Supp. 556 (D. Kan. 1986).

[159] Phelps v. Washburn Univ., 632 F. Supp. 455 (D. Kan. 1986).

[160] United States v. Texas, 628 F. Supp. 304 (E.D. Tex. 1985).

[161] United States v. LULAC, 793 F.2d 636 (5th Cir. 1986).

Nonresident Tuition

The plaintiff, whose parents were out-of-state residents, attended the University of Vermont for two years and applied for resident status for tuition purposes. Her application was rejected by the university's residency officer. Plaintiff appealed the decision to the university's appellate residency officer. After a hearing, at which plaintiff was represented by counsel, she received a written explanation of the denial. The plaintiff sought a declaratory judgment by the superior court on her residency status. The court granted the defendant's motion for summary judgment.[164] The plaintiff failed to raise substantial questions of law, and a review by the court of the university's quasi-judicial hearing required the filing of a writ of certiorari.

Another residential status case was decided in the Oregon Court of Appeals.[165] A student applied for resident status for tuition purposes.

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[162] Educational Testing Servs. v. Katzman, 626 F. Supp. 527 (D.N.J. 1985).

[163] Educational Testing Servs. v. Katzman, 793 F.2d 533 (3d Cir. 1986).

[164] Molesworth v. University of Vt., 508 A.2d 722 (Vt. 1986).

[165] Baillie v. State Bd. of Higher Educ., 719 P.2d 1330 (Or. Ct. App. 1986).

The application was denied because he received financial assistance from parents who did not reside in Oregon. The court of appeals found that the board may not deny in-state tuition to a student who is over eighteen solely because he receives financial support from nonresident parents without a determination of the student's actual bona fide residence. The case was remanded for a determination of plaintiff's residence.

Financial Aid

Financial aid benefits awarded by the Veterans Administration were the subject of litigation. The Veterans Administration sought to recover, as overpayments, educational assistance benefits paid to veterans who received failing grades in enrolled courses. The district court denied the plaintiff the right to recover.[166] On appeal,[167] the court of appeals reversed and held that the United States has a right to recover against veterans who receive educational benefits and then fail to earn grades which count for graduation, and that the veterans' due process rights would not be violated by United States' recovery of its overpayments.

An active-duty Marine officer sought judicial review of a Veterans Administration decision that educational benefits for full-time studies should be prorated to reflect his part-time enrollment.[168] The United States District Court for the District of Columbia dismissed the case and the officer appealed. The court of appeals, affirming the lower court decision, held that a constitutional challenge, not at issue in this case, remains the only justiciable basis on which to challenge Veterans Administration decisions on the allowance of veterans' benefits.

In another case, a Veterans Administration decision to disallow alcoholism, which is not part of a psychological disorder, as a valid reason to grant an extension of the time period to receive benefits was reasonable under the statute.[169] The court found the statute did not violate the Rehabilitation Act.

A veteran was notified that additional withdrawals from school would require corroborative statements from a doctor, employer, or school official to support subsequent awards of benefits. When the plaintiff requested copies of the regulations governing veterans benefits, he was given erroneous information which was subsequently corrected when the regulations were mailed to him. The court ruled that his claim under the Freedom of Information Act was moot, but costs incurred prior to the correction of the error could be awarded.[170]

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[166] United States v. Brandon, 601 F. Supp. 795 (W.D.N.C. 1985).
[167] United States v. Brandon, 781 F.2d 1051 (4th Cir. 1986).
[168] Roberts v. Walters, 792 F.2d 1109 (Fed. Cir. 1986).
[169] McKelvey v. Turnage, 792 F.2d 194 (D.C. Cir. 1986).

A number of cases involving defaulted student loans were filed in bankruptcy court. In several cases,[171] the court found that education loans were nondischargeable and the debtor failed to demonstrate undue hardship. However, in a Louisiana case,[172] the court remanded the case to determine which portion of the loan was used for educational purposes, as opposed to rent and food, in an attempt to determine which part of the loan was nondischargeable. Other cases dealt with procedural matters such as filing and payment requirements.[173] In a related case, the court on appeal found that the institution had provided adequate records to support its claim against an unpaid loan and the case was remanded.[174] In another related case, the court held that a third-party claim could not be brought against the university by a defaulting student.[175] The government won claims against two former education scholarship holders for a breach of a contract because they failed to provide agreed-to services after graduation.[176] In Virginia, the bankruptcy court ruled that the university could not withhold transcripts because of past-due accounts, because the policy contravened provisions of automatic stay of a student debtor under chapter 13.[177] An Illinois court held that loan funds designated to an individual but not yet distributed cannot be garnished.[178]

In New York, the court upheld an administrative decision by the Education Department to rescind certification and require repayment of tuition assistance grants from a business school.[179] The school had failed to uphold the certification requirements. The federal government was successful in a similar action involving a private seminary and financial aid assistance grants.[180] In South Carolina, the court found that a law providing tuition assistance to students attending nonprofit educational institutions did not violate the equal protection of a student enrolled at a proprietary institution.[181] A community college was successful in its claim that a work-study student would not qualify for workman's compensation in Arizona.[182]

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[170] Carter v. Veterans Admin., 780 F.2d 1479 (9th Cir. 1986).

[171] *In re* Craig, 56 B.R. 479 (Bankr. W.D. Mo. 1985); *In re* Frech, 62 B.R. 235 (Bankr. D. Minn. 1986); *In re* Harrison, 60 B.R. 9 (Bankr. E.D. N.Y. 1986); *In re* Vretis, 56 B.R. 156 (Bankr. M.D. Fla. 1985).

[172] *In re* Brown, 59 B.R. 40 (Bankr. W.D. La. 1986).

[173] *In re* Klein, 57 B.R. 818 (Bankr. 9th Cir. 1985); *In re* Wilcox, 57 B.R. 479 (Bankr. M.D. Ga. 1985).

[174] Administration of Tulane Educ. Fund v. Waters, 497 So. 2d 27 (La. Ct. App. 1986).

[175] United States v. Olavarrieta, 632 F. Supp. 895 (S.D. Fla. 1986).

[176] United States v. Bills, 639 F. Supp. 825 (D.N.J. 1986); United States v. Hatfield, 644 F. Supp. 63 (W.D. Mich. 1986).

[177] *In re* Parham, 56 B.R. 531 (Bankr. E.D. Va. 1986).

[178] Telford v. Tice, 488 N.E.2d 308 (Ill. App. Ct. 1986).

[179] Elmira Business Inst., Inc. v. New York State Dep't of Educ., 500 N.Y.S.2d 833 (App. Div. 1986).

[180] Beth Rochel Seminary v. Bennett, 624 F. Supp. 911 (D.D.C. 1985).

In the final case of this section, a student challenged the fee charged by a private contractor to process financial aid applications for the United States Department of Education.[183] The circuit court of appeals ruled that the fee did not violate the Higher Education Act of 1965, since the fee was used for the processing of data points which determine eligibility rather than for the processing of the application for aid.

First Amendment

Freedom of Speech. A Nebraska case leads off this section. The director of a theater of the arts on the campus of the University of Nebraska scheduled a controversial film which depicted the birth of Christ in a modern setting. After several complaints and political pressure from state senators, the director canceled the film. A complaint was filed in the federal district court against the university, the director of the theater, and others, alleging violations of constitutional rights.[184] The Court ruled that the university was immune from prosecution under the eleventh amendment, that the first amendment rights of those wanting to see the movie had been violated, and that the director of the theater could not be held liable for damages. The court reasoned that the state senators' actions made the cancellation an action of the state for an activity scheduled for a public forum.[185]

A professor and students of a law school requested a preliminary injunction against the Secretary of State of the United States. The motion sought to enjoin the Secretary from denying a permit to a representative of the Palestine Liberation Front from entering the country and speaking at a law school forum. The court found that the plaintiffs had not raised nonjusticiable political questions and that they were entitled to injunctive relief under the first amendment.[186]

In a Nebraska case, a privately owned student newspaper refused to print classified advertisements for roommates which contained information on the sexual orientation of the advertiser. The paper refused to print the gay and lesbian ads as a matter of editorial policy. The court found that the rejection of the ads was a constitutionally protected editorial discretion of the newspaper which would be upheld even if the paper was subsidized with state money.[187]

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[181] Talley v. South Carolina Higher Educ. Tuition Grants, 347 S.E.2d 99 (S.C. 1986).

[182] Pima Community College v. Arizona Dep't of Economic Sec., 714 P.2d 472 (Ariz. Ct. App. 1986).

[183] Riggsbee v. Bell, 787 F.2d 1564 (Fed. Cir. 1986).

[184] Brown v. Board of Regents of Univ. of Neb., 640 F. Supp. 674 (D. Neb. 1986).

[185] *Id.* at 681.

[186] Harvard Law School Forum v. Shultz, 633 F. Supp. 525 (D. Mass. 1986).

Freedom of Expression. The decision in a denial of recognition of a gay and lesbian organization hinged on the chronology of *Gay Student Services v. Texas A & M.*[188] The plaintiffs sought damages for denial of recognition by the institution three weeks after the Supreme Court denied certiorari in this case. The Court found that the eleventh amendment immunities and the existence of a real controversy as regards recognition in the Fifth Circuit was enough to dismiss the claims against the institution.[189]

Freedom of Religion. A student enrolled in bible studies at a Christian college was denied financial assistance by the Washington Commission for the Blind. The state supreme court upheld the Commission decision denying assistance based on state laws which prohibit the use of state funds for religious purposes.[190] The Supreme Court[191] balanced the establishment and the free exercise clauses of the first amendment. They ruled that direct aid to the student would not establish or aid a religion, but that to deny plaintiff his vocational choice, bible study, would inhibit the student's free exercise of his religion. The judgment of the state supreme court was reversed.

Dismissal

Disciplinary Dismissal. After an investigation showed that two alumni had failed to meet the requirements for the awarded degree, the university notified the plaintiffs of the allegations and set a hearing date. Plaintiffs were not allowed to bring legal counsel to the hearing and failed to attend. The institution revoked their degrees. In an action seeking a declaratory judgment, the appellate court affirmed a lower court decision that the institution had no authority to revoke the degrees. The state supreme court, reversing the lower court, ruled that, based on just cause and the holding of a fair hearing, an institution had the authority to revoke a degree.[192]

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[187] Sinn v. Daily Nebraskan, 638 F. Supp. 143 (D. Neb. 1986).

[188] *See* The Yearbook of School Law 1986 at 269, 737 F.2d 1317 (5th Cir. 1984), cert. denied, 105 S. Ct. 1860 (1985).

[189] Student Servs. for Lesbian/Gays v. Texas Tech, 635 F. Supp. 776 (N.D. Tex. 1986).

[190] Witters v. Commission for the Blind, 689 P.2d 53 (Wash. 1984).

[191] Witters v. Washington Dep't of Servs. for the Blind, 106 S. Ct. 748 (1986).

In Rhode Island, a student was sanctioned and subsequently suspended. The disciplinary action stemmed from controversies resulting from the plaintiff's participation in student government and his belligerent attitude toward two staff members at the institution. Sanctions placed against the individual included a denial of participation in student government, an order to seek psychiatric treatment, and, subsequently, suspension from the institution. The federal district court found that violations of plaintiff's due process existed, necessitating the reversal of all sanctions imposed or pending against the plaintiff.[193] The court found that an administrator at the institution exerted significant control over the three separate hearing boards so as to bias the outcome. The court also found that the plaintiff had a right to tape a hearing which could result in suspension. The court ordered a new impartial hearing on all of the charges.

A law student was injured when he was forced to exit his burning third-floor room through a window. Because of his injuries, he was disenrolled from the institution in good academic standing. Upon investigation of the fire, arson was suspected and the plaintiff was asked to either take a lie detector test or participate in a name-clearing hearing before reenrolling at the law school. The next academic year, the plaintiff, while not reenrolling, asked that a statement acknowledging his good academic standing with the law school be forwarded to another law school. The dean refused unless he was allowed to mention the allegations regarding the fire. The plaintiff sued, alleging deprivation of liberty and property rights and violations of due process, equal protection, and self-incrimination provisions of the Constitution. The court issued a summary judgment in favor of the law school dean.[194]

In a number of cases, the court found that the institutions' procedures did not violate the students' rights. In a previously litigated case,[195] the plaintiff was denied a rehearing based on a civil rights claim in his removal for plagiarism and cheating.[196] The plaintiff was also unable to maintain a claim that the requirements for the degree were eighty credits instead of eighty-one.[197] A New York court held that the institution's suspension of a student was not arbitrary or capricious,[198] while a

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[192] Waliga v. Board of Trustees of Kent State Univ., 488 N.E.2d 850 (Ohio 1986).

[193] Gorman v. University of R.I., 646 F. Supp. 799 (D.R.I. 1986).

[194] Picozzi v. Sandalow, 623 F. Supp. 1571 (E.D. Mich. 1986).

[195] *See* The Yearbook of School Law at 272, Easley v. University of Mich. Bd. of Regents, 619 F. Supp. 418 (E.D. Mich. 1985).

[196] Easley v. University of Mich. Bd. of Regents, 632 F. Supp. 1539 (E.D. Mich. 1986).

[197] Easley v. University of Mich. Bd. of Regents, 627 F. Supp. 580 (E.D. Mich. 1986).

[198] Galiani v. Hofstra Univ., 499 N.Y.S.2d 182 (App. Div. 1986).

Georgia court upheld the procedures followed in the suspension of a student at a private college.[199] A federal district court found that a foreign medical school would be subject to the constitutional guarantees and state statutes of the state where its agent had an office.[200]

In the final case in this section, plaintiff brought charges against a private law school, the state bar examiners, and a psychiatric hospital. The claims covered numerous federal statutes, constitutional provisions, and state laws. The court denied all claims and noted that the receipt of student financial aid at a private law school would not yield a finding of state action.[201]

Academic Dismissal. The academic dismissal cases continue to defer to academicians for academic decisions. In the lead case, the Supreme Court refused to hear a case on appeal which involved the dismissal of a student from a Ph.D. program. After a long, protracted period between the approval of the proposal and substantive progress on the research project, the committee met three times with the plaintiff to review her progress to date. When plaintiff was unable to provide either research data or extraneous research notes on the project, the committee suspended her candidacy for the degree. The court found no violations of due process in the university's actions and found the courts ill-equipped to review subjective academic decisions.[202] In an Alabama case, the court reached a similar result but also ruled that allowing a student to commence dissertation research did not remove the requirement to pass a qualifying exam.[203] In a Minnesota case, a student failed two final oral exams, and the court found no violations in the denial of a request for a grievance hearing or the doctoral committee's actions.[204] A master's student's rights were not violated when she failed her final oral exam.[205] In a Colorado case, the placement in a student's file of a poor evaluation based on a low grade did not violate due process rights.[206]

A number of cases involved dismissal from professional schools. Several cases involved students dismissed from medical school residency programs for poor performance, and the courts found no violations of due process.[207] Cases involving a dental student[208] and a nursing student[209] reached similar results concerning the students' claims, and confirmed the courts' reluctance to interfere with academic dismissal decisions and their refusal to acknowledge the existence of due process rights in these cases.

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[199] Life Chiropractic College, Inc. v. Fuchs, 337 S.E.2d 45 (Ga. Ct. App. 1985).

[200] Kosta v. St. George's Univ. School of Medicine, 641 F. Supp. 606 (E.D.N.Y. 1986).

[201] Martin v. Delaware Law School of Widener Univ., 625 F. Supp. 1288 (D. Del. 1985).

[202] Mauriello v. University of Medicine and Dentistry of N.J., 781 F.2d 46 (3d Cir. 1986), *cert. denied*, 107 S. Ct. 80 (1986).

[203] Haberle v. University of Ala. in Birmingham, 803 F.2d 1536 (11th Cir. 1986).

[204] Schuler v. University of Minn., 788 F.2d 510 (8th Cir. 1986).

[205] Amelunxen v. University of P.R., 637 F. Supp. 426 (D.P.R. 1986).

[206] Harris v. Blake, 798 F.2d 419 (10th Cir. 1986).

However, several cases did raise claims that had different results. A foreign medical student was dismissed for alleged, but unsubstantiated, poor performance in an internship program. The court found genuine issues which should be litigated on the student's claim of violations of equal protection and the deprivation of a liberty and property interest.[210] In Michigan, a state appeals court ordered that a case brought by a dismissed law student be remanded for trial.[211] The lower court had granted the university's motion for dismissal, based on evidence that a black student was dismissed after his overall grade-point average fell below a 2.0.

Other Constitutional Issues

A New York case raised questions regarding the rights of students to register to vote in the college community. The court held that the election commission rule, that the college dormitory was not a permanent and fixed residence, was an unconstitutional application of the state's election law.[212]

In another case, students were arrested in their dormitory room after they attempted to sell illegal substances to an undercover police officer.[213] The officer, invited into a dorm room by the occupants, did not need a warrant to make an arrest after witnessing a felony. The court noted that there was no reasonable expectation of privacy under these circumstances.

LIABILITY

Personal Injury

In a personal injury case involving a diving experiment, the plaintiff

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207. Lipsett v. University of P.R., 637 F. Supp. 789 (D.P.R. 1986); Mohammed v. Mathog, 635 F. Supp. 748 (E.D. Mich. 1986); Petock v. Thomas Jefferson Univ., 630 F. Supp. 187 (E.D. Pa. 1986).

208. Burke v. Emory Univ., 338 S.E.2d 500 (Ga. Ct. App. 1985).

209. Johnson v. Cuyahoga County Community College, 489 N.E.2d 1088 (Ohio C.P. 1985).

210. Banerjee v. Roberts, 641 F. Supp. 1093 (D. Conn. 1986).

211. Smith v. University of Detroit, 378 N.W.2d 511 (Mich. Ct. App. 1985).

212. Williams v. Salerno, 622 F. Supp. 1271 (S.D.N.Y. 1985).

213. State v. Dalton, 716 P.2d 940 (Wash. Ct. App. 1986).

alleged he suffered organic brain damage and emotional distress. The court granted a summary judgment in favor of the institution.[214] The experimentors had provided adequate information on known dangers and the plaintiff had signed a consent form. The court found the law governing ultrahazardous activities was not applicable in this case. In another case involving a training program, the court ruled in favor of the institution in a personal injury suit.[215] The court applied the doctrine of expressed assumption of risk when the student enrolled in the police training program. In a similar case, a student drowned while on a biology class field trip. The California Supreme Court reversed and remanded a case which was dismissed as untimely because plaintiff's attorney named the wrong public entity in his first claim and corrected it after the filing period had expired.[216]

Several cases resulted in the plaintiff becoming a quadraplegic. A student passenger in a jeep which overturned while traveling on a university service road sued the university. The court found that the service road, which was adequately posted as a service road and had a gate which someone left unlocked, was not a public roadway and the university was not negligent in maintenance or in the erection of barricades.[217] A university was not liable for an injury sustained in a lacrosse game where the sport was a club sport not subsidized by the university.[218]

Several cases involved injury from slipping on a wet surface. In one case, the state supreme court remanded a case because the plaintiff should have been allowed to present evidence of other accidents on the same stairs.[219] Those prior accidents, coupled with rain at the time of the plaintiff's accident, could have constituted a known dangerous condition obligating the defendant to corrective action. The request for a new trial on these issues was granted. In a New York case, the claims court accepted the plaintiff's late claim after she was injured when she slipped on a stairway at the City University of New York.[220] The court accepted the late claim because she had given prompt notice of her accident and had sought medical assistance when the extent of the injury became evident. However, the same court refused jurisdiction, as per the state code, in a similar claim against the Fashion Institute of Technology, which is not part of the CUNY system but rather a community college under the Board of Education of the City of New York.[221] In Missouri, the court found sovereign immunity blocked a tort liability claim by a woman who slipped on a sidewalk at a lodge owned by the university, even though the lodge was operated in a proprietary way.[222]

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[214] Whitlock v. Duke Univ., 637 F. Supp. 1463 (M.D.N.C. 1986).

[215] Black v. District Bd. of Trustees of Broward Community College, 491 So. 2d 303 (Fla. Dist. Ct. App. 1986).

[216] Bettencourt v. Los Rios Community College, 721 P.2d 71 (Cal. 1986).

[217] Allemeier v. University of Wash., 712 P.2d 306 (Wash. Ct. App. 1986).

[218] Hanson v. Kynast, 494 N.E.2d 1091 (Ohio 1986).

[219] Goldstein v. C.W. Post Center, 504 N.Y.S.2d 734 (App. Div. 1986).

[220] *In re* Crawford, 502 N.Y.S.2d 916 (Ct. Cl. 1986).

In a Virginia case, the court refused the institution's request for a summary judgment.[223] The institution was not immune from tort liability under charitable immunity in a suit involving an injury sustained when a hatch was blown off a roof during a storm. Charitable immunity would be granted only where the education provided was free.

Consumption of alcoholic beverages was involved in several personal injury cases. Two cases involved fraternities. In a Pennsylvania case,[224] fraternity members leased a third party's home and purchased alcoholic beverages which were served to minors who attended the party. Minors who left the party intoxicated were involved in an accident which left one passenger dead. In this suit, the United States district court found that Pennsylvania law would not hold tenants liable who agreed to lease their premises but did not furnish alcoholic beverages. However, the law would not hold liable those who purchased or transported the alcoholic beverages to the party. Liability would be applied only to those who served alcoholic beverages to the minor driver.

In another case, a female student at an all-women's college spent the night in the room of a member of a fraternity on another campus.[225] After consuming alcoholic beverages in the man's room, the plaintiff was injured in an automobile accident while the male was taking her back to her dorm. The court issued a summary judgment in favor of both the institution and the fraternity, finding that the member's actions were those of an individual and not a function sponsored by either the institution or the fraternity.

A spectator, injured when a goalpost being pulled down at the end of the Yale Bowl football game struck her, brought a suit against the institution and the city and its police.[226] Summary judgment was granted to the institution on the plaintiff's public nuisance claim on the grounds that the stadium was private property to which the public was invited through the purchase of tickets. The city and its police were not granted a summary judgment on plaintiff's claim of a breach of material duties.

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[221] Amato v. State, 502 N.Y.S.2d 928 (Ct. Cl. 1986).
[222] Anderson v. State, 709 S.W.2d 893 (Mo. Ct. App. 1986).
[223] Radosevic v. Virginia Intermont College, 633 F. Supp. 1084 (W.D. Va. 1986).
[224] Fassett v. Poch, 625 F. Supp. 324 (E.D. Pa. 1985).
[225] Campbell v. Board of Trustees of Wabash College, 495 N.E.2d 227 (Ind. Ct. App. 1986).
[226] Cimino v. Yale Univ., 638 F. Supp. 952 (D. Conn. 1986).

Material facts require a determination of whether adequate crowd control was used during the incident.

A plaintiff, a rancher, alleged that he was defamed when a report concerning the death of his cattle was made public. The court refused to grant summary judgment in favor of the institution and remanded the case for trial.[227] The court found no support for the institution's claim that its internal report for a private party was subject to the state's Public Record Act because it was an official act.

Workers' Compensation

In a Louisiana case, the state supreme court reversed a summary judgment in favor of the university.[228] The court noted that material facts existed to require a determination of whether an injured custodial employee of a contracted cleaning service was eligible for unemployment compensation where the institution claimed that the contracted work was outside its principal trade or business.

In a Texas case, the court ruled on appeal that the workman's compensation claims survived plaintiff's death, which was unrelated to this claim, where they are accrued benefits and as yet unpaid.[229] The court drew a distinction between accrued and unaccrued benefits in reaching this ruling.

Contract Liability

In the lead case in this section, the University of Minnesota brought a claim of royalties and specific performance against a corporation and its licensees under a patent agreement. The controversy developed over alleged similarities between two heart valves and a legal ruling[230] on patent infringement in California. The court affirmed in part of the lower court ruling that the university was entitled to royalties as part of the patent agreement.[231] In a companion case, the federal circuit court denied the licensee's motion to enjoin the claim in the Minnesota state court and stayed the action before the federal district court pending resolution of the claims in Minnesota.[232]

A number of cases involved claims involving contracts for services.

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[227] Neary v. Regents of Univ. of Cal., 230 Cal. Rptr. 281 (Ct. App. 1986).

[228] Palmer v. Loyola Univ., 496 So. 2d 421 (La. Ct. App. 1986).

[229] Simmons v. University of Tex. Sys., 706 S.W.2d 752 (Tex. Ct. App. 1986).

[230] Washington Scientific Indust., Inc. v. Shiley Laboratories, Inc., 187 U.S.P.Q. 236 (1975).

[231] Regents of Univ. of Minn. v. Medical Inc., 382 N.W.2d 201 (Minn. Ct. App. 1986), *cert. denied*, 107 S. Ct. 307 (1986).

[232] Intermedics Infusaid v. Regents of Univ. of Minn., 804 F.2d 129 (Fed. Cir. 1986).

In one case, the university had failed to bill a federal agency for certain services performed under a contract. The court of claims ruled that the institution, under the Contracts Disputes Act, had presented its claim in a timely manner and denied the government's motion for dismissal.[233] In a New York case, the institution notified the telephone company that it would no longer accept financial responsibility for third-party calls made to campus numbers. The phone company made no effort to block third-party calls, a capability they possessd. The court ruled that the statute of limitations commenced tolling anew for each payment period where payment was refused. The case was dismissed because the statute of limitations had run out on all claims.[234] In Virginia, a photographer sued for copyright violations when the institution used copyrighted photographs in another publication without the photographer's permission. The court dismissed the case because the institution and its officials had raised a valid eleventh amendment immunity claim.[235]

Cases involving construction on campus also were before the court. In a New Mexico case,[236] the court found that minimum wage statutes did not apply to the installation of telecommunications equipment, since the statute specifically applied to the "construction, alteration, demolition or repair"[237] of buildings. In North Carolina, the contractor who installed a temporary, fragile roof was not responsible for damage caused by other contractors working on the roof which resulted in water damage inside the building.[238] The court noted that the warning to the owner of the building at the time the contractor completed the temporary installation and vacated the premises was sufficient. In another case, a contractor was not barred from bringing a claim in court for extras over and above the contract costs without seeking an administrative remedy.[239] In a Pennsylvania case, an institution was not allowed to proceed directly against a subcontractor.[240] In New York, the court applied strict liability to a contractor who installed defective panels used for certain walls of a building.[241]

Cases alleging breaches of lease agreements were also litigated. In Maine, a private institution's Board of Trustees decided that fraternities were no longer within the mission and scope of the institution and removed institutional recognition. The court found that the institution had not breached the lease to a fraternity of a house it owned since fraternities must cease to exist on campus by board resolution.[242] In New York, a private institution could not terminate the lease of a tenant who was employed by another institution when the terms of the lease allowed for termination only when employment at N.Y.U. ceased.[243] Since the plaintiff was never an employee of N.Y.U., the termination provisions had no force.

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[233] Board of Governors of Univ. of N.C. v. United States, 10 Cl. Ct. 27 (1986).
[234] New York Telephone Co. v. State, 496 N.Y.S.2d 655 (Ct. Cl. 1985).
[235] Richard Anderson Photography v. Radford Univ., 633 F. Supp. 1154 (W.D. Va. 1986).
[236] Universal Communications Sys. Inc. v. Smith, 726 P.2d 1384 (N.M. 1986).
[237] *Id.* at 1385.
[238] E.L. Scott Roofing Co., Inc. v. State, 346 S.E.2d 515 (N.C. Ct. App. 1986).
[239] Jones v. Iowa State Bd. of Regents, 385 N.W.2d 240 (Iowa 1986).
[240] Manor Junior College v. Kaller's, Inc., 507 A.2d 1245 (Pa. Super. Ct. 1986).
[241] Trustees of Columbia Univ. v. Exposaic Indus., Inc., 505 N.Y.S.2d 882 (App. Div. 1986).

The final case in this section involved a letter of admission to a medical internship program which set tuition at a certain amount.[244] Upon matriculation, the amount of tuition had been increased by the state legislature. The court ruled that there was no breach of contract where a disclaimer in the school catalogue stated that tuition charges were subject to change. Furthermore, the initial tuition amount stated in the letter did not represent a contractual obligation.

Deceptive Practices

The plaintiff alleged breach of contract, fraudulent misrepresentation, intentional infliction of emotional distress, and negligent infliction of emotional distress in a suit against a Caribbean medical school.[245] After paying application fees, tuition, and room and board and attending the institution for a short period, plaintiff found conditions to be inconsistent with the representation made by the school's agent in Miami. The court, at trial, awarded damages on the breach of contract claim but dismissed the other claims. On appeal, the state supreme court affirmed the lower court decision.

In a case involving alleged fraudulent misrepresentations in courses and instruction against a private institution in Iowa organized to teach transcendental meditation, the defendant institution presented a motion to grant blanket protection of "trade secrets."[246] The institution feared that the plaintiffs, who were now devoted followers of a competitor institution, would reveal secret techniques to the competitor, jeopardizing the defendant's business. The court granted a limited protection only to video and audio tapes, the identities of nonparties who participate in defendant's programs, and financial records of the institution. The requested blanket protection was denied.

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[242] Chi Realty Corp. v. Colby College, 513 A.2d 866 (Me. 1986).

[243] Cooper Union v. New York Univ., 500 N.Y.S.2d 984 (Sup. Ct. 1986).

[244] Prusack v. State, 498 N.Y.S.2d 455 (App. Div. 1986).

[245] Reimer v. Tien, 514 A.2d 566 (Pa. Super. Ct. 1986).

[246] John Does I-VI v. Yogi, 110 F.R.D. 629 (D.D.C. 1986).

A Louisiana student who enrolled in a proprietary school alleged a breach of contract in the school's promise that the degree program was the equivalent to a two-year associate degree program transferrable to a four-year college. An appellate court affirmed the lower court decision, awarding damages in the amount of the tuition costs paid by the student.[247] The court found that the institution's misrepresentations required a refund of the total tuition charges regardless of the point at which plaintiff finally sued the institution.

In an Idaho case,[248] a student had enrolled in a course of study which the school bulletin stated would qualify the individual to enter the work force as a journeyman. Upon finding that the course would not qualify him as a journeyman, plaintiff sued alleging a claim under the tort claim act. The state supreme court, in an appeal from a summary judgment, affirmed that the claim could not be made under the tort claim act. The court granted the plaintiffs the right to amend their claim to a breach of contract claim within a specified time period.

Educational Malpractice

A plaintiff who suffered a stroke while having her neck manipulated by a chiropractor sued the chiropractor, the institution who certified him, and an oral contraceptive company whose medication she had been taking.[249] The chiropractor settled out of court; the lower court issued a summary judgment in favor of the institution in the educational malpractice claim; and the oral contraceptive claim went to a jury. In affirming the educational malpractice claim, the court cited previous case law[250] and stated four reasons for its decision. It refused the educational malpractice claim because: (1) there are no satisfactory standards of care; (2) there was inherent uncertainty in determining the cause and nature of any damage; (3) there would be an undue burden placed on educational institutions in the ensuing flood of litigation;[251] and (4) there would be blatant interference in the daily operations of educational institutions by the courts.[252]

Negligence

In a Utah case, a student alleged negligence in the supervision of a field trip. The student was injured when she became intoxicated, wandered off, and fell from a cliff. The instructor had shown the students the area, warned them of hazards, and told them they were on their own after hours. The student consumed alcohol at a barbeque held for all the students at a local ranch and also in the back of a van driven back to camp by the instructor. The court found the university had no duty to protect the student from her voluntary intoxication nor to enforce the university code or the state law prohibiting consumption by minors.[253]

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[247] Till v. Delta School of Commerce, Inc., 487 So. 2d 180 (La. Ct. App. 1986).

[248] Wickstrom v. North Idaho College, 725 P.2d 155 (Idaho 1986).

[249] Moore v. Vanderloo, 386 N.W.2d 108 (Iowa 1986).

[250] *See* The Yearbook of School Law 1986 at 280, Swidryk v. St. Michaels Medical Center, 493 A.2d 641 (N.J. Super. Ct. App. Div. 1985).

[251] *See* n.249, at 114.

[252] *Id.* at 115.

In a case involving an accident on a stairway, the court upheld a lower court decision finding the plaintiff negligent.[254] In a Florida case, the plaintiff was negligent when he went swimming in a lake and was injured by an alligator.[255] The plaintiff, a student, ignored signs in a university-owned recreation park which contained explicit warnings and prohibited swimming in the lake. In another case, the institution and the plaintiff were found to be 50% negligent.[256] The appellate court upheld the total damage award of $160,000 where the university's amount did not exceed the statutory limit of $100,000.

In both a defamation and negligence suit, an institution reported that a candidate for a public office had never attended a course as he had claimed. The institution, late in the election campaign, found that he had and publicly acknowledged its error. The appellate court affirmed that the institution had a valid sovereign immunity claim.[257]

ANTITRUST

In Idaho, a plaintiff brought action against the university and other parties when the university gave exclusive rights to the use of its Minidome for a trade fair to the Pocatello Chamber of Commerce.[258] Prior to that year, plaintiffs had sponsored a trade fair in the Minidome, the only facility of the type necessary for a trade fair in eastern Idaho. A summary judgment, emanating from an eleventh amendment bar to litigation, was granted to the university by the federal district court.

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[253] Beach v. University of Utah, 726 P.2d 413 (Utah 1986).

[254] Cotrona v. Johnson & Wales College, 501 A.2d 728 (R.I. 1985).

[255] Palumbo v. Game & Fresh Water Fish Comm'n, 487 So. 2d 352 (Fla. Dist. Ct. App. 1986).

[256] University of Tex. at El Paso v. Nava, 701 S.W.2d 71 (Tex. Ct. App. 1986).

[257] Freeman v. Del Mar College, 716 S.W.2d 729 (Tex. Ct. App. 1986).

[258] Ferguson v. Greater Pocatella Chamber of Commerce, 647 F. Supp. 190 (D. Idaho 1985).

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